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# United States Circuit Court of Appeals

## FOR THE SECOND CIRCUIT

ABRAHAM FISHGOLD,
Plaintiff-Respondent,

against

SULLIVAN DRYDOCK & REPAIR CORPORATION,
Defendant,

ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor-Appellant.

### Statement Under Rule 13.

This action was commenced by the service of the summons and complaint on defendant on or about July 6, 1945. Defendant served an answer on or about July 30, 1945. The intervener served an answer to the complaint on or about August 20, 1945.

The hearings were held before Hon. Matthew T. Abruzzo on August 20 and 29, 1945, at the conclusion of which a decision was rendered in favor of plaintiff.

The plaintiff was represented by Knowlton Durham. The defendant was represented by J. Read Smith. The intervener union was represented by M. H. Goldstein and Mr. Rosenfeld.

There has been no change of parties or attorneys herein.

4

**Summons.**

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| ABRAHAM FISHGOLD, Plaintiff, v. SULLIVAN DRYDOCK & REPAIR CORPORATION, Defendant. | Civil Action File No. 5700 |

5 *To the above named Defendant:*

You are hereby summoned and required to serve upon Knowlton Durham, plaintiff's attorney, whose address is 70 Pine Street, Borough of Manhattan, New York City, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

PERCY G. B. GILKES,
Clerk of Court.

By NAN V. MCNABB,
Deputy Clerk.

6

Date: July 6, 1945.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

**Complaint.**

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| ABRAHAM FISHGOLD, Plaintiff, against SULLIVAN DRYDOCK & REPAIR CORPORATION, Defendant. | C-5700 |

ACTION UNDER SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT OF 1940, AS AMENDED, AND THE APPLICABLE SUBDIVISIONS THEREOF, TO SUE WITHOUT TAXATION OF FEES OR COURT COSTS FOR THE ENFORCEMENT OF THE LAWS OF THE UNITED STATES FOR THE BENEFIT OF PERSONS INDUCTED INTO THE LAND OR NAVAL FORCES FOR TRAINING AND SERVICE

Plaintiff, by Knowlton Durham, his attorney, complaining of the defendant, alleges:

FOR A FIRST CAUSE OF ACTION:

FIRST: That at all the times hereinafter mentioned the plaintiff was and still is a resident of the Borough of Brooklyn, the City and State of New York.

SECOND: Upon information and belief, that at all the times hereinafter mentioned the defendant was and still is a domestic corporation organized and existing under and by virtue of the Laws of the State of New York.

THIRD: Upon information and belief, that at all the times hereinafter mentioned the defendant was and still

is engaged in the business of constructing and repairing naval and other vessels of various types at its shipyard at the Foot of 23rd Street, Borough of Brooklyn, City and State of New York.

FOURTH: That, prior to the 22nd day of May, 1943, plaintiff was employed by the defendant as a welder in a position other than temporary, at its said plant in the Borough of Brooklyn.

FIFTH: That on or about the 22nd day of May, 1943, plaintiff was inducted into the land forces of the United States, under the provisions of The Selective Training and
11 Service Act of 1940, as Amended, for training and service, and on or about said day, in order to perform such training and service, he left his position of employment with said defendant.

SIXTH: That thereafter plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which date he was honorably discharged therefrom with a certificate that he had satisfactorily completed his period of training and service.

SEVENTH: That within forty (40) days after his discharge from the Army of the United States, as aforesaid, and on or before the 21st day of August, 1944, plaintiff
12 applied to the defendant for reinstatement in his former employment with the defendant and that at the time of making such application the plaintiff was qualified to perform the duties of the position he had formerly occupied.

EIGHTH: That on or about the 25th day of August, 1944, defendant restored plaintiff to his former position, but thereafter and from time to time, the defendant without cause and contrary to the provisions of The Selective

Training and Service Act of 1940, as Amended, "laid off" the plaintiff from such employment and refused to permit him to work in its employment on the following days, viz.: April 9, 10 and 11; May 17, 18, 19, 20, 21, 22, 23 and 24, 1945, and that on each of such days the plaintiff's wages had he been employed by the defendant would have amounted to a minimum of $9.60 for eight (8) hours of work.

NINTH: Upon information and belief that on each of the days when the plaintiff was "laid off", as aforesaid, the defendant's plant was in operation and other employees, possessing the same or comparable skill and experience as the plaintiff, were continued at work by the defendant.

TENTH: That the act of defendant in "laying off" the plaintiff from time to time, as aforesaid, constituted a violation of the provisions of Section 8 of The Selective Training and Service Act of 1940, as Amended, and by reason of the premises plaintiff was deprived of the rights guaranteed him by said Section 8 of the Act, and has suffered and will continue to suffer loss of his position and of his wages and of the benefits granted to him by said Act.

FOR A SECOND CAUSE OF ACTION:

ELEVENTH: Plaintiff repeats and re-alleges each and all of the allegations set forth in paragraphs "First" to "Tenth", inclusive, with the same force and effect as if set forth in full herein, and further alleges:

TWELFTH: That, pursuant to the provisions of Section 8 of The Selective Training and Service Act of 1940, as Amended, plaintiff was entitled to be restored to his former employment and to be continued therein without discharge or "lay-off" without cause for a period of one year from

the date of his reinstatement nor could he be discharged therefrom or temporarily "laid off" so long as the defendant's operations required the employment of employees holding positions similar or comparable to that of the plaintiff.

THIRTEENTH: Upon information and belief, that the cause of the plaintiff's being "laid off" from work in his restored employment was due to protests made to the defendant by Brooklyn Local No. 13 of the Industrial Union of Marine & Shipbuilding Workers of America contending that, when there was not sufficient work at the
17 plant to occupy all of the defendant's employees, plaintiff should be "laid off" by the defendant before it should "lay off" employees with greater union seniority and tenure of service.

FOURTEENTH: That the plaintiff protested to the defendant against being "laid off" by the defendant, but the defendant continued and still continues to "lay off" the plaintiff from time to time when there is not sufficient work to occupy all of the employees of the defendant holding positions similar or comparable to that of the plaintiff.

FIFTEENTH: That the protest made by Brooklyn Local No. 13 of the Industrial Union of Marine & Shipbuilding Workers of America, as aforesaid, did not constitute
18 "cause" under the provisions of said Act for the plaintiff's being "laid off" by the defendant and being denied work by it from time to time, as aforesaid, nor did it justify the defendant in its actions with respect to the plaintiff.

SIXTEENTH: All and singular the premises are true and within the jurisdiction of the United States under the provisions of The Selective Service and Training Act of 1940, as Amended, and of this Honorable Court.

WHEREFORE, plaintiff demands judgment against the defendant:

(1) for the sum of $115.60 by reason of the loss of wages sustained by the plaintiff by reason of the defendant's unlawful acts, as aforesaid; and

(2) for a declaratory judgment that the defendant be specifically required under the provisions of Section 8 of The Selective Training and Service Act of 1940, As Amended, to continue the plaintiff in its steady employment for the period of one year from the 25th day of August, 1944, so long as defendant's operations necessitate the employment of employees holding positions similar or comparable to that of the plaintiff;

(3) for a declaratory judgment that the protests filed by Brooklyn Local No. 13 of the Industrial Union of Marine & Shipbuilding Workers of America, as aforesaid, do not constitute just cause under the provisions of said Act for "laying off" the plaintiff from his former position or from one of like seniority, status and pay; and

(4) for such other, further and different relief as to this Court may seem just, together with the costs and disbursement of this action.

KNOWLTON DURHAM,
Attorney for Plaintiff,
Office & P. O. Address,
No. 70 Pine Street,
Borough of Manhattan,
New York, N. Y.

(Verified July 5, 1945.)

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## Answer of Defendant.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Defendant, by J. Read Smith, its Attorney, answering the Complaint of the plaintiff herein:

AS TO THE FIRST CAUSE OF ACTION

FIRST: Admits the allegations contained in paragraphs marked "Second" and "Third".

23

SECOND: Denies that it has any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in paragraphs of the Complaint marked "First", "Fifth", "Sixth" and "Seventh".

THIRD: Denies the allegations contained in paragraph of the Complaint marked "Fourth", except it admits that prior to the 22nd day of May, 1943, plaintiff was employed by the defendant as a Welder at its plant in the Borough of Brooklyn.

FOURTH: Denies the allegations contained in paragraph of the Complaint marked "Eighth", except it admits that on
24 or about the 25th day of August, 1944, defendant restored plaintiff to his former position.

FIFTH: Denies the allegations contained in paragraphs of the Complaint marked "Ninth" and "Tenth".

AS TO THE SECOND CAUSE OF ACTION.

SIXTH: In respect to paragraph of the Complaint marked "Eleventh", the defendant realleges the allegations of para-

graphs "First" to "Fifth", inclusive, hereof with the same force and effect as if the paragraphs were repeated at length.

SEVENTH: Denies the allegations contained in paragraphs of the Complaint marked "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth" and "Sixteenth", except that the defendant admits that the premises are within the jurisdiction of the United States under the provisions of the Selective Training and Service Act of 1940, as Amended, and of this Honorable Court.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO THE ALLEGED CAUSES OF ACTION STATED IN THE COMPLAINT.

EIGHTH: That on or about the 20th day of February, 1942, Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, was certified by the National Labor Relations Board as the bargaining agent for the majority of the defendant's employees, including Welders.

NINTH: That pursuant to said certification, defendant was obliged to and did enter into a Labor Agreement with said Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America.

TENTH: That the said Agreement contained the following provision:

"MILITARY SERVICE

Any employee other than a probationary employee who volunteers for or is drafted into the Naval or Military service of the United States, shall retain his length of service standing and shall have the time spent by him in such service count towards his length

of service standing; the employee so volunteering or drafted must give the Company notice in writing of his intention to so leave his employment; any such employee who within forty (40) days of release or discharge from said service applies for re-employment shall be re-hired provided he is fit for duty and work is available. The availability of work will be determined according to length of service and ability. If re-employed, said employee shall receive the then current rate of pay for the job for which he is re-employed."

ELEVENTH: That on or about the 17th day of May, 1944, a new Contract was entered into between the defendant and Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America containing the following provision:

"MILITARY SERVICE

Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee, who within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee

shall then receive the then current rate of pay for the job for which he is re-employed."

That said clause was in effect and operation on or about August 25th, 1944 and is still in effect and operation.

TWELFTH: That on or about August 25th, 1944, said Labor Agreement contained and at the present time does contain the following provision:

"Should any difference arise between the Company and the Union with respect to any grievance or with respect to the meaning or the application of any of the provisions of this Agreement, they shall be disposed of between the parties hereto and an earnest attempt shall be made to settle such differences within a reasonable time as hereinafter provided.

In the event that a dispute shall not have been settled satisfactorily between the Union and the Company, said dispute shall be submitted to arbitration. If, within five (5) days after the date of the decision of the Company with which the Union disagrees, The Company and the Union cannot agree upon an Arbitrator, the National War Labor Board shall be asked to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters to be arbitrated under the within contract shall be limited to the interpretation and application of the said Contract."

THIRTEENTH: That on or about August 25th, 1944, the aforesaid Contract contained and at the present time does contain the following clause:

"Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

FOURTEENTH: That on or about August 25th, 1944, defendant restored the plaintiff to his former position and employ and the plaintiff has since that date been and still is employed by the defendant although from time to time between August 25th, 1944 and the present date, due to the exigencies of production and the periodic "drop-off" of available work, plaintiff has been "shaped-up", pursuant to the provisions of the aforesaid Labor Agreement.

FIFTEENTH: That on or about March 31st, 1945, the plaintiff herein was permitted to work in the defendant's plant, although its employee, G. Jackerson, was "shaped-up".

SIXTEENTH: That on or about March 31st, 1945, the said G. Jackerson had greater length of service with the defendant than the plaintiff had at that time.

SEVENTEENTH: That on or about April 2nd, 1945, Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, filed a written grievance with the defendant, pursuant to the terms of the aforesaid Labor Agreement; said "grievance", in effect, protested the action of the defendant in the "shaping-up" of the said G. Jackerson and the permitting of the plaintiff to work in his stead.

EIGHTEENTH: The defendant decided the "grievance" in favor of the plaintiff and the matter was thereafter submitted to an Arbitrator, appointed by the National War Labor Board.

NINETEENTH: The aforesaid Arbitrator rendered his decision and opinion, a copy of which is annexed hereto and made a part hereof.

TWENTIETH: That neither the Selective Training and Service Act of 1940, as Amended, nor the Labor Agreement required the defendant to keep the plaintiff at work if it necessitated the "laying-off" or "shaping-up" of an employee with greater seniority or length of service with the defendant.

WHEREFORE, the defendant demands judgment that the Complaint be dismissed and for such other further and different relief as to this Court may seem just and proper.

J. READ SMITH,
Attorney for Defendant,
Office and P. O. Address,
44 Court Street,
Borough of Brooklyn, N. Y.

**Exhibit Annexed to Answer of Defendant.**

| | |
|---|---|
| In the Matter of Arbitration between SULLIVAN DRY DOCK & REPAIR CORP. (Brookyn, N. Y.) and INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C.I.O., LOCAL 13. | Re: Seniority of returning veteran named Abraham Fishgold. |

STATEMENT OF CASE AND OPINION OF ARBITRATOR.

I

This case involves a demand of the Union that Abraham Fishgold, a reemployed veteran, shall not be given sen-

iority rights in excess of those accumulated during his term of employment with the Company plus the time he spent in the Army. It is the position of the Company that to grant such a request would be contrary to instructions received from the Director of Selective Service, New York City Headquarters. Pursuant to the method provided in the contract for the naming of an arbitrator, the undersigned was appointed by the National War Labor Board to act as arbitrator for the parties in this dispute. The issue involved is as follows:

> "Whether or not G. Jackerson (a non-veteran) was properly shaped-up on March 31, 1945 to provide work
41 for Abraham Fishgold (a discharged veteran), as provided by Articles IV and VIII of the existing agreement between the parties."

By "shape-up" is meant the process whereby employees are daily engaged for work or laid off in accordance with the amount of work available at a particular time. Other factors being equal, seniority determines which men are to assume work duties or to be laid off on a given day.

Both Jackerson and Fishgold progressed from lower rated jobs to the rating of 1st Class Mechanics, and as welders are substantially equal in ability. Jackerson has been in the employ of the Company since November 25, 1942. Fishgold started work at the plant on December
42 21, 1942, entered the United States Army on June 5, 1943, and following his military discharge was reemployed by the Company on August 25, 1944 with full seniority credit for the time he spent in the service. Upon being shaped-up in favor of Jackerson early in March 1945, Fishgold made complaint to the local Selective Service Headquarters. Acting upon advice from that Office that veterans are entitled to super-seniority, Fishgold was given precedence over Jackerson in the shape-up on March 31, 1945. It is

on the basis of such incident that the case herein developed.

II

Article IV, Section 6 of the agreement between the parties provides that:

> "* * * decreases in the working force shall be based upon length of service and ability to do the job. Whenever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

Article VIII of the agreement reads:

> "Any employee * * * who is drafted or volunteers 44
> for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as though he were actually and continuously employed by the Company * * *. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the 45
> job, for which he is re-employed."

In accordance with contract procedure, Jackerson, the non-veteran, was entitled to preference in the shape-up on March 31, 1945. The Company was prompted to act contrary to such procedure only on the basis of instructions in three letters sent by the Director of Selective Service. The final letter of March 31, 1945 made more specific

the points discussed in the two previous letters and reads, in part, as follows:

"In the case of the above named veteran, it appears that he was laid-off under a so-called 'shape-up' because, from time to time, there was not enough work to go around for all the employees and that non-veterans with greater union seniority than he had and were doing exactly the same kind of work that he was, were kept at work on the 'shape-up'.

"It is the position of Selective Service System that a veteran who has been reinstated in employment may not be laid off or denied the right to work if there is
47 work to be done which he is capable of doing. In other words, under a 'shape-up' or any other similar practice, if there is *some* work available for *some* men, the veteran must be kept at work even though this may necessitate laying off non-veterans with greater union seniority."

III

Such a ruling is in direct conflict with the above provisions of the collective bargaining agreement and in order to supersede them must find valid support in law. The legal basis for protection of reemployment rights to veterans is the Selective Training and Service Act of 1940, as Amended (hereinafter referred to as the Act). Rele-
48 vant portions of Section 8 of that Act are as follows:

"(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon completion of such period of training and service * * *.

"(b) In the case of any such person who, in order to perform such training and service has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have no changed as to make it impossible or unreasonable to do so;

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (B) of subsection (b) shall be considered as having been on furlough or leave of absence during the period of training and service in the land or naval forces, shall be restored without loss of seniority, shall be entitled to participate in insurance and other benefits * * * and shall not be discharged from such position without cause within one year after such restoration."

According to the context of the provisions of the above act, the maximum obligations of the Company to the returning veteran are: That he shall be rehired upon proper application and showing of certificate; that he shall suffer no loss in his status as employee as a result of his absence from the plant to participate in the armed forces; and that he shall be retained in the employ of the Company, with all his rights secured, for the period of one year.

Each of these requirements has thus far been strictly fulfilled. Fishgold has been reinstated and maintained in employment with accumulated seniority and enjoyment of benefits other employees might have gained during the period of time he spent in the service. There remains but one question as an issue in dispute; whether, under the provisions of the Act, the Company is required to go a step further and grant top seniority to veterans in the matter of lay offs.

In this respect it is found that the Act, in defining rules of conduct, makes no reference by express or implied language that a veteran shall be given super-seniority. Nor
53 is it believed that such a right could have been intended. The purpose of the Act, as clearly stated by its provisions, was designed to preserve inviolate the job status of the returning veteran as though his participation in the military service had caused no break in the continuity of employment; not to assure him of perquisites, the bestowal of which might entail far reaching implications. For the application of such super-seniority rights to lay offs would not only tend to disrupt the organization of a plant during the reconversion period by denying it the use of more highly experienced personnel; deprive non-veterans of rights after they had been earned and separate them from jobs they had reason to consider as their own; arouse antagonism between two groups of employees; but of equal importance, it would be contrary to our traditions of de-
54 mocracy and especially to a higher important value in our society—our sense of fair play. Considering these possible consequences and the conflict which would arise if seniority as between veterans were graded on the basis of the date they returned to the plant, the adoption of the practice of super-seniority would also result to the disadvantage of veterans. Moreover, though it cannot be denied that consideration is due the veterans as a just reward

for their service and sacrifice, it is not believed that more of them expect or would desire to become such a preferred class of job holders.

Since it is found that the agreement which provides for the shape-up in accordance with seniority is not invalidated by the Act, neither by its language or possible intent, the agreement should govern the relations between the parties in this matter unless there exists some other factor which can be deemed controlling.

IV

On May 5, 1944, National Headquarters of the Selective Service System issued Memorandum No. 190-A, entitled 56
"Reemployment Policies". Part IV, Section 4(b), which relates to the instant dispute reads:

> "A veteran who has been reinstated to his former position cannot be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his reemployment rights under the Act, and would be, in effect, a repeal of an Act of Congress."

It is apparently that provision in the Memorandum which acted as a basis for the ruling by Selective Service System in its letter of March 31, 1945 to the Company.

This Memorandum, as stated in its first paragraph, sets 57
forth policies adopted by National Headquarters "for the guidance of all members of Selective Service System who are charged with carrying out its Veteran's Assistance Program". As such, the Memorandum represents views regarding application of the provisions of the Act, and is not deemed as having foundation in law. Though under broad rules of liberal construction, reasonable doubts might be resolved in favor of the Act, nevertheless, the position

taken in the Memorandum with regard to layoffs is of such a nature as to go beyond the realm of interpretation and to add, in effect, a significant reemployment provision to the Act. Such power is not conferred on the Selective Service System by the statute. To the contrary, aside from its important functions in rendering assistance to ex-service men as permitted under the Act, paragraph (e), Section 8 of that act otherwise limits the administrative authority of the Selective Service System with regard to the procedure that is to be used in carrying out the reemployment provision, to the extent that enforcement duties are delegated to other agencies.

59 Finally, as for the last statement in Part IV, Section 4(b) of the Memorandum, it is difficult to accept the view that a veteran, in the absence of top seniority as to lay offs would actually be deprived of all his reemployment rights under the Act. The acceptance of such a viewpoint would imply that intermediate aspects of a condition can be satisfied only if the extreme of that condition is achieved; or more specifically, that unless protection as to reemployment is assured in its ultimate aspect, no degree of protection can benefit the veteran. Such an absolute approach overlooks the fact that the scope of a right consists of a series of steps, and while successive ones progress in intensity, each step in the scale, nevertheless, constitutes a right in itself. In the instant matter, the veteran's right to reemployment was fixed at a certain point by the Act:
60 to protect him against loss of job-status for the period of time spent in military service. It can hardly be denied that such protection is of inestimable value to those veterans formerly job holders.

V

The decision that the shape-up should be determined on the basis of seniority, as provided for in the agreement,

rests upon the finding that the Act does not, expressly or by implication, prevent such a practice or give support to Section 4(b) of Part IV contained in Memorandum No. 190-A.

The appropriate award in conformity with the conclusion reached in this opinion is attached herewith.

Dated: May 4, 1945.

/s/ FRANK HARRIS
Frank Harris
Arbitrator

---

In the Matter of Arbitration
between
SULLIVAN DRY DOCK & REPAIR CORP.
and
INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C.I.O.; LOCAL 13.

Re: Seniority of returning veteran named Abraham Fishgold.

AWARD

The decision of the Arbitrator is that: 63

Pursuant to Articles IV and VIII of the existing agreement between the parties, G. Jackerson, a non-veteran, should not have been paid off in the shape-up on March 31, 1945 in order to provide work for Abraham Fishgold, a discharged veteran.

Dated May 4, 1945.

/s/ FRANK HARRIS
Frank Harris
Arbitrator

64

**Answer of Intervener.**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK:

| | |
|---|---|
| ABRAHAM FISHGOLD, Plaintiff, against SULLIVAN DRY DOCK & REPAIR CORP., Defendant, | C-5700. |
| 65 ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members, Intervener. | |

The intervener, by William L. Standard, his attorney, in answer to the allegations of the complaint, alleges:

AS TO THE FIRST CAUSE OF ACTION

1. Denies any knowledge or information sufficient to form a belief with respect to the allegations of paragraphs "Fourth", "Fifth", "Sixth", "Seventh", "Eighth" and
66 "Ninth" of the complaint.

2. Denies each and every allegation of paragraph "Tenth" of the complaint.

AS TO THE SECOND CAUSE OF ACTION

3. Repeats, reiterates and realleges with respect to the allegations of paragraph "Eleventh" of the complaint, the allegations of paragraphs "1" and "2" of the answer herein.

4. Denies each and every allegation contained in paragraphs "Twelfth", "Thirteenth" "Fourteenth", "Fifteenth" and "Sixteenth" of the complaint.

AS AND FOR A FIRST COMPLETE SEPARATE AND AFFIRMATIVE DEFENSE, THE INTERVENER ALLEGES:

5. That the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. is a trade union composed of a large number of local affiliated unions whose members are employed in the shipbuilding and repair industry throughout the United States and that John Green is the president thereof.

6. That Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. is a trade union affiliated with the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. and is subject to the authority of the Constitution and by-laws thereof.

7. That during or about the month of January, 1945, the General Executive Board of the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. pursuant to the authority conferred upon it by the Constitution and by-laws assumed full control over the property and affairs of Local 13, including its collective bargaining agreements, and appointed Roy Granata as Administrator with full power to act as President and Treasurer of said Local 13 and that the said Roy Granata assumed said offices and is now exercising the functions thereof.

8. That on or about the 20th day of February, 1942, and pursuant to the provisions of the National Labor Relations Act, the National Labor Relations Board certified Local 13 as the sole and exclusive bargaining agent for the production and maintenance employees of the defend-

ant, Sullivan Dry Dock and Repair Corp. including the employees of the welding department of said defendant.

9. That thereupon, and in accordance with the provisions of the National Labor Relations Act; the defendant recognized Local 13 as such sole and exclusive bargaining agent and on or about April 6th, 1942 entered into a collective agreement, has, from time to time, been modified and as modified, been extended, and the agreement as modified and extended is presently in full force and effect and was in full force and effect at all times mentioned in paragraphs "Fourth", "Fifth" and "Eighth" of the complaint.

71 10. That by virtue of its assumption of control over the property and affairs, including the collective agreement with the defendant, Sullivan Dry Dock and Repair Corp., of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, the Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. has succeeded to all the rights and privileges enjoyed by Local 13 under said agreement.

11. That said agreement, a copy of which is annexed hereto, includes, and at all times mentioned in paragraphs "Fourth", "Fifth" and "Eighth" of the complaint also included, among others, a provision that tenure of employment is governed by seniority and that all reductions and 72 increases in the working force shall be in accordance with the length of employment.

12. That said agreement includes and at all times mentioned in paragraphs "Fourth", "Fifth" and "Eighth" of the complaint also included a further provision to the effect that any employee of the defendant entering the armed forces shall retain his seniority standing and that upon his return to employment shall receive the same seniority standing as if he had remained continuously employed.

13. That said provisions of the collective bargaining agreement are consistent with the Selective Service and Training Act of 1940 as amended and afforded to plaintiff all the rights granted by the provisions of said Act.

14. That plaintiff, upon his discharge from the armed forces, was re-employed and credited with seniority as of the date of his first employment with the defendant in accordance with the provisions of said agreement and the provisions of the Selective Service and Training Act of 1940, and that he had not been laid off or discharged in violation either of the provisions of said collective agreement or of any of the provisions of said act. 74

AS AND FOR A SECOND COMPLETE SEPARATE AND AFFIRMATIVE DEFENSE, THE INTERVENER ALLEGES:

15. Repeats, reiterates and realleges each and every allegation of the First Complete Separate and Affirmative Defense herein in paragraphs numbered "5", "6", "7", "8", "9", "10", "11", "12", "13" and "14".

16. That the defendant, Sullivan Dry Dock and Repair Corp. operates a ship repair yard and it is the customary practice for its working force to fluctuate from day to day in accordance with the number of vessels delivered to said defendant for repairs.

17. That said day to day reductions and increases in the working force is accomplished by means of the "shape up" system whereby employees are put to work as needed when work is available, in accordance with the seniority provisions of the collective agreement.

18. That said employees who are "shaped up" remain employees and are not considered as discharged or "laid off".

76 *Answer of Intervener.*

19. That at none of the times mentioned in the complaint and at no other time, was plaintiff laid off or discharged but he was, from time to time "shaped up" in accordance with seniority and without losing his status as an employee of the defendant.

AS AND FOR A THIRD COMPLETE SEPARATE AND AFFIRMATIVE DEFENSE, THE INTERVENER ALLEGES:

20. Repeat, reiterate and reallege each and every allegation of the First and Second Complete Separate and Affirmative Defenses herein in paragraphs numbered "5",
77 "6", "7", "8", "9", "10", "11", "13", "14", "15", "16", "17", "18" and "19".

21. That at none of the times set forth in paragraph "Eighth" of the complaint, was the plaintiff laid off or discharged without cause.

WHEREFORE, the intervener prays for a judgment dismissing the complaint herein, together with costs, and for such other and further relief as to this Court may seem just and proper.

WILLIAM L. STANDARD,
Attorney for Intervener,
Office & P. O. Address,
78 291 Broadway,
Borough of Manhattan,
City of New York.

M. H. GOLDSTEIN,
Of Counsel,
1420 Walnut Street,
Philadelphia, Pa.

79

**Exhibit Annexed to Answer of Intervener.**

AGREEMENT between the SULLIVAN DRY DOCK & REPAIR CORPORATION, or its successors or assignees and LOCAL 13 of the INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, affiliated with the Congress of Industrial Organizations.

This AGREEMENT executed this 17th day of May, 1944, between the SULLIVAN DRY DOCK & REPAIR CORPORATION, hereinafter referred to as the "Company", and LOCAL 13 of the INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, hereinafter referred to as the "Union",

80

WITNESSETH:

WHEREAS, the United States of America is engaged in a bitter struggle for its very existence and the cooperation of labor and industry is vitally needed to win the war,

NOW, THEREFORE, in consideration of the premises and of the mutual covenants hereinafter arrived at, the parties hereto make the following agreement:

ARTICLE I

RECOGNITION

SECTION 1. The Company recognized the Union as the sole and exclusive bargaining agent for all its production and maintenance employees, including watchmen and guards, excluding electricians, their helpers and snappers; excluding foremen, sub-foremen, supervisors, timekeepers and any one in an official capacity on a salary basis, draftsmen and office employees as provided for by the National Labor Relations Board supplemental decisions and certifications of representatives dated February 20, 1942 and April 20, 1942.

81

82 *Exhibit—Agreement between Defendant and Local 13.*

(a) All employees who have been properly listed as members of the Union in good standing at any time since March 1, 1943 and who are members of the Union in accordance with its constitution and by-laws on March 10, 1944, shall as a condition of employment, maintain their membership in the Union in good standing for the duration of the collective bargaining agreement in which the provision is incorporated, or until further order of the Commission unless they resign in writing from the Union during the period beginning February 26, 1944 and ending March 12, 1944.

As a condition of resignation, unpaid initiation fees and
83 Union dues, due up to February 26, 1944, shall be paid at the time of resignation, or satisfactory arrangements made with the Union to accomplish this purpose.

The Union shall, immediately after the aforesaid date, furnish the National War Labor Board with a notarized list of its members in good standing as of that date.

The Union, its officers and members shall not intimidate or coerce employees into joining the Union or continuing their membership therein.

(b) If a dispute arises as to whether an employee (1) was a member of the Union of the date specified above or (2) was intimidated or coerced during the fifteen-day "escape period" into joining the Union or continuing his membership therein, such dispute may be submitted for
84 determination by an arbitrator to be appointed by the National War Labor Board. The decision of the arbitrator shall be final and binding upon the parties.

(c) If a dispute arises as to whether an employee (1) has failed to maintain his membership in the Union in good standing after the aforesaid date; or (2) was intimidated or coerced into joining the Union after the aforesaid date, such dispute may be submitted for determination by an arbitrator to be selected in the manner provided by the

contract of the parties, or if no such provisions exist, to be selected by special agreement. In the absence of such a contract provision or special agreement, the arbitrator will be selected by the National War Labor Board on due application. The decision of the arbitrator shall be final and binding upon the parties.

(d) Any party desiring to post or otherwise publish an official explanation by the National War Labor Board of the foregoing maintenance of membership provision may use the attached form of notice. A statement of the procedure to be followed in administering the maintenance of membership provision, the absence of some other procedure agreed to by the parties is also attached. 86

## ARTICLE II

### Check Off of Dues

The Company will deduct from the pay of each employee who is a member of the Union, initiation fees and each month the sum of One Dollar and Twenty-five cents ($1.25) as Union dues, and will transmit all monies so deducted to the appropriate Local of the Industrial Union of Marine and Shipbuilding Workers of America, before the end of said month and the Union will issue to the Company its official receipt therefor.

The Check-Off system shall commence with one month's deductions during the month following submission of membership lists by the Union. All arrangements as to details of effectuating the system shall be negotiated by the parties. 87

88 *Exhibit—Agreement between Defendant and Local 13.*

## ARTICLE III

### Discrimination—No Strike or Lockout—Functions of Management—Union Activity

Section 1. The Company agrees that neither it nor its officers, foremen or supervisors will discriminate against any employee included in this Agreement because of membership in or activity on behalf of the Union.

Section 2. There shall be no lock-out of any kind by the Company and there shall be no walk-out or sit-down strike or any cessation of work or restriction of work of
89 any kind or for any cause or on account of any controversy whatsoever by the Union or any of the members thereof who are or shall be employees of the Company during the term of this Agreement.

Section 3. Nothing in this Agreement shall be deemed to limit or restrict the Company in anyway in the exercise of the customary functions of management including the right to make such rules not inconsistent with the terms of this Agreement relating to its operation as shall be deemed advisable, and the right to hire, suspend, discharge or otherwise discipline any employee for violations of such rules or other proper cause.

Section 4. Shop Stewards shall be permitted to exer-
90 cise their function as such in cases of discharge or suspension cases or any emergency case arising under the contract on company time and on plant property as long as there is no interference with production. The Union shall be permitted to place notices of Union meetings on bulletin board provided by the Company.

## ARTICLE IV

### SENIORITY

SECTION 1. The following departments shall be recognized in the yard: Hull, Welding, Pipefitting, Rigging, Burning, Inside Machinists, Outside Machinists, Blacksmiths, Carpenters, Joiners, Wood Caulkers, Laborers and Fire Watchers.

SECTION 2. The Company shall prepare and post for each such department a list showing the length of service of each employee according to his trade classification within the department. Such lists shall be arranged in order 92
of service and copies shall be furnished the Union.

Any employee may protest in writing his length of service as posted by the plant, provided he does so within two weeks after his name is posted in the list. Such protest shall be handled as any other grievance.

SECTION 3. Employees shall lose all seniority rights if:

(a) They terminate their services voluntarily when needed.

(b) They are discharged for proper and sufficient cause.

(c) They do not report for work when notified unless within three days they present a reasonable excuse.

(d) They do not work for the plant for three (3) months 93
(consecutive) unless absence is due to illness or injury (as evidenced by a proper medical certificate), or unless leave-of-absence has been granted.

SECTION 4. An employee in one classification when temporarily transferred to another department due to lack of work in his own department, shall have his name placed at the bottom of the temporary department's list, but shall

retain his standing in his own department when rehiring takes place.

No employee shall be transferred to a department when such transfer will prevent the return to work of an available and competent employee of that department (his relative competency in each instance to be determined by the respective Foreman) or cause the lay-off of any employee in that department.

SECTION 5. Shop Stewards shall, for the term of their elective office, have top seniority rights in their respective departments.

95

SECTION 6. Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor.

SECTION 7. All available work and/or overtime in a craft or classification shall be divided equally within reason, among all employees of said craft or classification.

SECTION 8. The Union shall be permitted to maintain no more than one Shop Steward for each department. A Shop Steward shall retain the top seniority position so long as he remains Shop Steward and upon relinquishing his office
96 as Shop Steward, he shall return to his regular seniority standing.

SECTION 9. The Company agrees to grant reasonable leaves of absence or reasonable periods of time off to any employee who shall be appointed or elected to office by the Union or who shall be assigned by the Union to do Union work. Such employees shall retain their seniority standing, and leaves of absence or periods of time off as the

case may be, shall be counted toward their seniority of such employees as if they were actually and continuously employed by the Company. No leave of absence of period of time off, however, shall extend beyond one year and ten days. The Foreman shall be notified in advance of such leave.

SECTION 10. Each employee shall receive two hours pay for shaping up when called in and not put to work.

## ARTICLE V

### WORK WEEK AND OVERTIME RATES 98

SECTION 1. The regular work week shall consist of forty hours, five days, at eight hours each, Monday to Friday inclusive. All work performed in excess of hours other than those of the employees' regular eight hours shift, shall be compensated at the rate of one and one-half times the established hourly base rate.

SECTION 2. A regular shift shall be considered to be an eight hour day period, exclusive of lunch period.

SECTION 3. All work to be performed on Saturday shall be paid for at the rate of time and one-half the regular hourly rate. All work performed on Sundays and the following holidays: New Year's Day, Independence Day, 99
Labor Day, Columbus Day, Washington's Birthday, Lincoln's Birthday, Armistice Day, Election Day, Memorial Day, Thanksgiving Day and Christmas Day, shall be paid at the rate of double time.

In the event that the provisions thereof conflicts with those of the provisions of the Atlantic Coast Zone Standards Agreement, then the provisions of the Atlantic Coast Zone Standard Agreement shall prevail.

100 *Exhibit—Agreement between Defendant and Local 13.*

SECTION 4. Overtime pay shall be paid for all work performed before regular starting time and after regular quitting time of the shift to which the employee is regularly assigned. When employees work for a continuous period of twenty-four hours, their overtime pay shall continue until such time as they are relieved from work for a period of at least ten hours.

SECTION 5. All shift hours shall be determined by the Company after discussion with representatives of the Union.

101 SECTION 6. All employees working on the night shift shall receive a bonus of 7% over day rates for all hours of work.

## ARTICLE VI

### VACATIONS

SECTION 1. All employees who have been employed by the Company for a total of 1570 straight time hours during the period of one year from the anniversary date of employment, shall receive one week's vacation with pay. Those employees who have been so employed by the Company for five or more years, shall receive two week's vacation with pay.

102 SECTION 2. The number of hours for which an employee shall be paid for a vacation week shall be the average number of hours worked per week during the ten pay periods immediately preceding the beginning of his vacation, with a minimum allowance of 40 hours and a maximum allowance of 48 hours. Vacation pay shall be calculated on the basis of the employee's base rate of pay at the time the vacation is taken or the payment in lieu thereof made.

SECTION 3. Any employee who is separated after he has qualified for a vacation shall be paid in cash for the number of days vacation allowance due him as provided under the provisions of Section 1 of this Article.

SECTION 4. Time lost through injury occurring while working for the Company shall not be deducted in computing time hours worked towards vacation.

SECTION 5. The employees who claim vacations under the provisions of this Article shall notify the Company on forms to be provided by the Company. The Company reserves the right to permit an employee to take vacation in accordance with its operational requirements or convenience. 104 The actual date when vacation is taken shall not effect the time when the employee is entitled to his next vacation, but the eligibility of each employee for his vacation pursuant to this Article, shall be determined on the basis of the anniversary date of his employment.

## ARTICLE VII

### WAGE SCALE—DIRTY WORK—PENALTY PAY—UPGRADING AND PROMOTIONS—APPRENTICES

SECTION 1. The following shall be the rates of pay for the duration of this Agreement, except as hereinafter provided: 105

| | |
|---|---|
| Snappers | $1.30 per hour |
| Temporary Snapper | 1.30 " " |
| Mechanics First Class | 1.20 " " |
| Improvers—3 months—third class (with tools) | 1.00 " " |
| Improvers—9 months—second class | 1.09 " " |
| Improvers—15 months—1st Class Improver | 1.17 " " |

| | | | |
|---|---|---|---|
| Improvers—21 months—1st Class Mechanic (if vacancy exists) | 1.20 | " | " |
| Punch & Shearer | 1.20 | " | " |
| Helpers—starting rate | .82 | " | " |
| Helpers—first class | .86 | " | " |
| Helpers—heavy forge | 1.04 | " | " |
| Helpers—bending slabs | 1.00 | " | " |
| Holder-On | 1.05 | " | " |
| Tack Welders—First 3 months | .82 | " | " |
| Tack Welders—Second 3 months | 1.00 | " | " |
| Tack Welders—Third 3 months | 1.14 | " | " |
| Welders (first class) | 1.20 | " | " |
| 107 Laborers | .82 | " | " |
| Dock Workers 70% at | 1.05 | " | " |
| 30% at | .91 | " | " |
| Rivet Heater | .91 | " | " |

The following shall be classified as Mechanics: Blacksmiths, Light Fires, Burners, Boilermakers, Carpenters, Chippers and Caulkers, Shipfitters, Riveters, Drillers, Reamers, Machinists, Outside and Inside, Riggers, Sheetmetal Workers, Plumbers and Pipefitters, Painters, Scalers, Punch & Shearers, Dock Workers, Wood Caulkers, Welders, Crane Operators, Engineers, Acetylene Welders and Brazers.

SECTION 2. During a probationary period of three (3)
108 weeks from the date of his hiring, a new mechanic employee may be paid at the lowest rate of the classification in which the work he is hired for falls. Upon the expiration of the probationary period he shall be paid the regular guaranteed hourly base rate to which he is entitled.

SECTION 3. Specialists shall include Rigger Loftsmen, Mold Loftsmen, Coppersmiths, Heavy Forgers, Pattern

makers, Toolmakers, Layout Ironworkers, Steam Crane Operators, Furnacemen, Flange Turners.

The minimum rate for any specialist shall be $1.28 per hour, except that in any specific case a higher rate may be agreed upon between the Union and the Company.

SECTION 4. It is understood that the above rates and classifications shall remain in effect during the term of this Agreement until and unless otherwise modified by the National War Labor Board in Case No. 111-3516-D (24-524-D).

SECTION 5. Wages shall be paid in cash or check on the 110
Company's time.

SECTION 6. An employee required to work in unclean diesel crank case pits, unclean tanks, unclean bilges, unclean tank tops and unclean oil tanks shall receive extra compensation in addition to his regular compensation for such work, at the rate of one-half his regular hourly base rate of pay. In the event that the representatives of the Company and the Union cannot agree that work in any specific equipment as above enumerated is dirty work under the provisions of this section, then and in that event, the resident inspector of the Government Agency for which the work is being performed shall be consulted, whose decision shall be binding.

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SECTION 7. If a dispute arises as to payment of additional compensation for dirty work or premium work, it shall be disposed of under the provisions of this contract dealing with grievances and no employee shall cease work because of any such refusal to pay additional compensation.

SECTION 8. The Union agrees that apprentices may be employed in such numbers as the Company considered

necessary to maintain an adequate trained working force, first class mechanics and replacements.

An "apprentice" is an employee who agrees to work directly under first class mechanics for a period of time specified in this Article in order to learn a trade and qualify to become a first class mechanic. All apprentices in the employ of the Company shall serve a four year term, during which time the Company will undertake to favor them every reasonable effort to learn their trade, will clarify their tasks accordingly and will provide instructions.

Rates of pay for apprentices shall be as follows pro-
113 vided, however, that no apprentice shall receive an increase in pay at the end of any six months period unless his progress is satisfactory:

| | |
|---|---|
| First six months | $ .50 per hour |
| Second six months | .60 " " |
| Third six months | .74 " " |
| Fourth six months | .82 " " |
| Fifth six months | .87 " " |
| Sixth six months | .92 " " |
| Seventh six months | 1.01 " " |
| Eighth six months | 1.09 " " |
| First class mechanic's rate thereafter. | |

Upon completion of the four year course and upon a
114 Foreman's recommendation, an apprentice shall receive a certificate or letter to that effect and receive the classification of first class mechanic with a seniority status.

Nothing in this Article shall be construed to mean that the Company guarantees or promises that upon the satisfactory completion of his four year term, an apprentice will be employed as a mechanic.

The Foreman or head of the department of any apprentice may discharge any apprentice for lack of skill, ill

health or lack of application and interest in his work and the work of the Company or any other just and proper cause.

## ARTICLE VIII

### Military Service

Section 1. Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward 116
his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the job for which he is re-employed.

## ARTICLE IX

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### Safety and Health

Section 1. (a) The Company shall continue its practice of providing reasonable provisions for the safety and health of its employees while at work. Protective devices and other equipment required by law to protect employees from injury shall be provided by the Company. The Union agrees that it will encourage its members to work in a safe manner.

(b) A Safety and Health Committee of five members consisting of two representatives of the Union and three representatives of the Company shall be established.

The Safety Engineer employed by the Company will act as Chairman. The functions and regulations governing the Committee shall be formulated by the said Committee.

## ARTICLE X

### Traveling Time

An allowance for traveling time shall be granted as follows:
119

1. To jobs outside the yard located on the Brooklyn waterfront between 60th Street, South Brooklyn, and Broadway, Williamsburg Bridge—no travel time.

2. To jobs located in Brooklyn, North of Broadway or south of 60th Street, including ships moored in the Army Base, and jobs located on the Manhattan waterfront either East or North River up to 42nd Street—½ hour each way.

3. To jobs in Manhattan, North of 42nd Street or on the Jersey waterfront as far North as the Fort Lee Ferry and as far south as Jersey City or at Piers 1 to 5 on Staten Island—1 hour each way.

120 4. To jobs in Claremont, New Jersey, or in Clifton or at Piers 6 to 21, Stapleton, Staten Island—1½ hours each way.

5. To jobs in Kearney, Port Newark, Bayway or Bayonne, New Jersey, 1½ hours each way.

6. To jobs at Yonkers or City Island—1¾ hours each way.

7. To jobs at other locations outside the limits of New York City—to be dealt with individually as they arise, consistent with allowances specified above and approximating the time normally required to travel between the Yard and the outside job.

## ARTICLE XI

SECTION 1. Should any difference arise between the Company and the Union with respect to any grievance or with respect to the meaning or the application of any of the provisions of this Agreement, they shall be disposed of between the parties hereto and an earnest attempt shall 122
be made to settle such differences within a reasonable time as hereinafter provided.

SECTION 2. All disputes shall be first taken up by the departmental Shop Steward with the Foreman of the department involved.

SECTION 3. Should the dispute remain unresolved, then it shall be discussed by the member or members of the Grievance Committee designated by the Union and by the designated representative for the Company. The Union's Grievance Committee shall consist of no more than five members of the Union who shall be chosen from a designated panel of seven. The Union's Grievance Committee 123
and the Company's representative shall meet regularly once each week. The decision must be given by the Company at the following meeting.

SECTION 4. In the event that a dispute shall not have been settled satisfactorily between the Union and the Company, said dispute shall be submitted to arbitration. If, within five days after the date of the decision of the Com-

pany with which the Union disagrees, the Company and the Union cannot agree upon an arbitrator, the National War Labor Board shall be asked to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters to be arbitrated under the within contract shall be limited to the interpretation and application of the said contract.

SECTION 5. The Company shall keep a record of the decisions reached in all meetings between its representatives and the Union's Grievance Committee, a copy of which
125 record shall be furnished the Union.

SECTION 6. Time lost in the settlement of grievances on Company property during his regular working hours by a Union Officer, Shop Steward or member of the Grievance Committee employed by the Company, shall be paid for by the Company at the regular hourly rate of the employee involved.

SECTION 7. It is understood that discharge cases are to be handled as grievances and in the event that back pay is to be given to reinstated employees, it is understood that an earnest effort will be made by both parties to this Agreement that such grievance be handled and disposed of within a six (6) payroll week period from the date that
126 the grievance is lodged irrespective of whether the grievance is submitted for arbitration.

## ARTICLE XII

### PROBATIONARY PERIOD—UNFAIR STATEMENTS—EFFECT OF UNION AGREEMENT AND FEDERAL LAW

SECTION 1. New employees shall serve a probationary period of thirty (30) days during which they not only shall

not acquire length of service or seniority rights, but may be laid off; dismissed or transferred at the option of the Company. Length of service or seniority rights where such employee, after a probationary period, is accepted for work, shall be retroactive to the date of commencement of his employment.

SECTION 2. The Company shall not discharge nor suspend any employee save for proper and sufficient reason. A man so discharged or suspended shall be supplied in writing by the Foreman or head of his department with the reasons for such discharge or suspension. A copy of such written reasons for such discharge or suspension shall be 128 furnished the Union's Grievance Committee.

SECTION 3. All cases of discharge or suspension shall be treated as grievances and shall be dealt with in the same manner as other grievances pursuant to Article XI of this Agreement.

## ARTICLE XIII

### WAGE REOPENING AND SUBORDINATION CLAUSE

SECTION 1. If, during the life of this Agreement, increases in the salaries and/or wages of the employees, to correct maladjustments resulting from rises in the cost of living, should be legally permissible, nothing contained in this contract shall be deemed to prevent the reopening of 129 the wage rates thus affected for renegotiation at the request of either party.

SECTION 2. The terms and conditions of the Atlantic Coast Zone Standards and any directives issued thereunder and any amendments or modifications thereof hereafter effective, are hereby made a part of this Agreement: and if the terms and conditions of this Agreement at any time violate or conflict with the terms of the Atlantic Coast Zone

Standards Agreement, the Zone Standards Agreement shall prevail during the period of the National Emergency.

## ARTICLE XIV

This Agreement shall be effective from the date hereof to the 23rd day of June, 1944. Either party, however, may reopen this contract or any part thereof for modification or for amendment (except that rates of pay shall not be changed other than as set forth in Article VII and prior to June 23, 1944) by giving thirty (30) days notice in writing to the other party.

131 If no agreement as to modification or amendment is reached within a further thirty (30) day period, this contract shall be null and void unless an extension of time is agreed upon by both parties in writing.

It is understood and agreed, however, that the sole purpose in so declaring the contract null and void shall be to place the parties hereto in a position to settle the dispute before the War Labor Board.

SULLIVAN DRY DOCK & REPAIR CORPORATION
By GERARD M. McALLISTER
President

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING
132 WORKERS OF AMERICA CIO LOCAL 13

| | |
|---|---|
| FRED NOLAN | Business Agent |
| MAX SHARER | Shop Steward |
| HERBERT ANDERSEN | Shop Steward |
| JOHN KING | Vice President |

FOR THE GENERAL EXECUTIVE BOARD
IUMSWA—CIO

MORRIS MILLER
National Representative

## Hearing of August 20, 1945.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

| | |
|---|---|
| ABRAHAM FISHGOLD, Plaintiff, vs. SULLIVAN DRY DOCK & REPAIR CORPORATION, Defendant. | Civil 5700 |

United States Court House,
Brooklyn, N. Y.,
August 20, 1945.

Before: HONORABLE MATTHEW T. ABRUZZO, U. S. D. J.

APPEARANCES:

KNOWLTON DURHAM, Esq., for the plaintiff.
J. READ SMITH, Esq., attorney for defendant.

M. H. GOLDSMITH, Esq., and MR. ROSENFELD, attorneys for Industrial Union of Marine Shipbuilding Workers of America, and Local 13, an affiliate.

HAROLD CAMMER, Esq., attorney for Congress of Industrial Organization.

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The Court: Mr. Durham appears for the plaintiff. Is he here?

Mr. Durham: Yes, your Honor.

The Court: Now the Sullivan Dry Dock Corporation appears by whom?

Mr. Smith: By J. Read Smith.

The Court: Are you Mr. Smith?

Mr. Smith: Yes, I am, your Honor.

The Court: I think there are others who want to come in. Suppose we take one at a time. Whom do you represent?

Mr. Rosenfeld: I represent the Industrial Union of Marine Shipbuilding Workers of America, the National Union, and Local 13, a local affiliate. Both of those organizations are parties to the collective bargaining agreement
137 which is now in effect in the shipyards operated by the defendant. I have spoken to counsel for both parties and we have agreed that this motion for formal intervention as an intervening defendant should be heard by your Honor this morning before trial, and I served on both the other parties a copy of my motion and the supporting documents, and may I file the original with your Honor?

The Court: Is there any objection to the intervention?

Mr. Durham: The plaintiff makes this objection, your Honor.

The Court: Well, there is an objection?

Mr. Durham: Yes.

The Court: Do you object, Mr. Smith?

Mr. Smith: I have no objection. I will abide by your decision in the matter.

138 The Court: That is one motion to be heard.

Mr. Rosenfeld: May I continue just a moment? Mr. M. H. Goldstein, of Philadelphia, is general counsel for the Union. Mr. Goldstein is admitted to all the Pennsylvania courts and would like to try this case.

The Court: He is not in yet?

Mr. Rosenfeld: He would like to argue a motion.

The Court: You want him to argue the motion. That is perfectly all right, even though you are not admitted.

Mr. Cammer: I am Harold Cammer. I represent the Congress of Industrial Organizations, which is the CIO and the parent body of the Union which is involved in this action. I have made a motion by notice of motion here Friday to intervene as amicus curiae for the purpose of filing a brief with respect to the issues here involved. 139

The Court: Is there any objection to that motion?

Mr. Durham: The same general objection.

The Court: Is there anybody else? Now suppose we take your motion. I will allow that motion to be filed.

Mr. Goldstein: If the Court please, the intervening parties, or the proposed intervening parties, are, as Mr. Rosenfeld has stated, the Local Union, which has a collective bargaining contract with the defendant Sullivan Dry Dock & Repair Corporation — 140

The Court: Is this plaintiff a member of that Union?

Mr. Goldstein: This plaintiff is, sir. And which has had such a contract since April 6 of 1942. The interest of the Local Union is, of course, in the maintenance of the validity and effectiveness of that contract. The complaint in this cause would have you enter a declaratory judgment that—paraphrasing the complaint—the protests made by Local 13 against the granting of special privileges to the complainant should be held not to be good cause within the purview of Section 8 of the Selective Training and Service Act of 1940, for the deprivation of the plaintiff of any opportunity to work. In effect, that request to your Honor, or the Court, to issue such a declaratory judgment would be, if decided by you favorably, a finding that the seniority clauses and various other clauses of the contract were ineffectual, or invalid, indeed, under the Selective Training and Service Act of 1940, in the protection of certain of the rights of the various employees, whether union members or not, and of the defendant, for whom Local 13, under an Act of Congress, the National Labor Relations Act, is the exclusive collective bargaining 141

agent. Those employees, under the Act of Congress and under the decisions of the Supreme Court, are bound, as is the defendant himself, the defendant employer, by the bargain made collectively for all of the employees, irrespective of whether they are or are not members of the Union. Under other decisions——

The Court: What would be the objection to their coming in? They seem to have a stake in this. What is your objection?

Mr. Durham: I want to explain. We are very much interested in getting this question settled and, from that point of view, I would have no objection to their filing any
143 brief with your Honor that they wish to file. It seems to me they are not proper parties to this proceeding.

The Court: They might be on the theory that the contract here before me apparently is the contract which all of the members of that local had. Is that right? Now, they might have a stake in this particular contract, might they not, that would be to the benefit of or to the detriment of everyody else in that Union.

Mr. Durham: This contract was made two years after the Selective Training and Service Act was enacted.

The Court: I am inclined to think that particular local ought to be in here.

Mr. Durham: Speed is of the essence in this case.

The Court: There will be no delay. I might as well make the announcement there will be no delay in this thing
144 whatsoever. I am taking time out in the summer to try this case, when we never try cases like this in the summer, and I am sure I will not allow counsel to delay it.

Mr. Goldstein: We are prepared to proceed immediately.

The Court: All right. I will let you in.

Mr. Goldstein: Would you care to hear from me as to the National Union?

The Court: No. This is only the local.

Mr. Goldstein: Would you hear me for one moment for the National?

The Court: What is the number of the local?

Mr. Goldstein: Local 13 of the Industrial Union of Marine Shipbuilding Workers of America. Now, the local's autonomy, pursuant to the provisions of the National Organization's constitution, was suspended, temporarily suspended, in January of this year. The appointees of the National Organization, most of them members of the local, are now administering the affairs of the local. The National Organization is hence responsible as trustee for the contract and for the maintenance of its validity and complete effectiveness.

The Court: What you mean is the CIO is really the parent of this child.

Mr. Goldstein: I am not speaking for the CIO. I am speaking for the National Union, the Industrial Union of Marine Shipbuilding Workers of America, which has quite a number of locals, among them Local 13.

The Court: Why shouldn't they be in as amicus curiae? Only one has a stake. I will let anybody in as amicus curiae.

Mr. Goldstein: It is not going to make any material difference, except——

The Court: There is a great deal of difference if there is an appeal. An amicus curiae would have no standing on an appeal, whereas as a party he would have a standing.

Mr. Goldstein: You are quite right, sir, but at the present time the affairs of Local 13 are being administered by the National Organization.

The Court: 13 is administering them, too, isn't it?

Mr. Goldstein: They exist, of course, as members——

The Court: I don't think your parent organization has an interest which would be violated in any way by not letting it in, because if I would allow the local in that would permit you to bring up anything you might possibly

want to bring up. You can file a brief as amicus curiae for that particular organization.

Mr. Goldtein: Since you have admitted the local as a defendant intervenor, would you be so good as to reserve the other point for further deliberation later?

The Court: I will reserve that until you file a brief. If I see you have any interest which might be harmed, I do not want you to lose it. On the other hand, if your interest is protected by one, you are not going to be more protected by two. What is the next?

Mr. Cammer: My motion is simply to intervene as an amicus curiae for the Congress of Industrial Organiza-
149 tions.

The Court: I see no objection to that. I will allow it. The record will show you have a right to file a brief.

Mr. Cammer: I have it here.

The Court: Suppose you make an opening statement.

Mr. Durham: If your Honor please, the Selective Training and Service Act of 1940 contains the law which is applicable to this case. May I give your Honor this brief which I prepared, which quotes the law, and it may be of help to you in following any argument. One page 2 of the brief, the law is quoted, the applicable parts of it are quoted, and it provides that any person who has been inducted into the armed forces and satisfactorily completes his period of training and service shall be entitled to a certificate to that effect upon the completion of such period
150 of training and service. Then it provides that in case such person, in order to perform such training and service has left or leaves a position other than a temporary one in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position and (3) makes application for re-employment within ninety days—I might explain at the time applicable here that was forty days and the statute was subsequently

amended to ninety—if he makes application within ninety days after he is released from such training and service. Then the next section says, "If such position"—I will skip that one. Section B says, "If such person was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

I call attention to the fact, your Honor, that those are the conditions and the only conditions stated in the Act itself as to the re-employment, or the restoration rather, of the veteran who returns and makes application. He must have the certificate, he must be still qualified, he must make his application within the designated number of days and he must be restored to that position or a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable.

The next section I have quoted here, subsection C of Section 8, provides that the veteran, after being restored, shall be considered as having been on furlough or leave of absence during his period of training and service and shall be so restored without loss of seniority, he shall be entitled to participate in insurance or other benefits offered by the employer and shall not be discharged from such position without cause within one year after such restoration.

Now, as I understand the question at issue here, it is simply whether a veteran who has qualified with those four conditions and is restored to his position, the position which he formerly occupied, or call it a job, can he or should he replace a non-veteran who has greater seniority if there is only one job for the two in the plant? That, as I understand it, is the essence of the question before us today.

The Court: Do you mean is that the question the defendant is raising?

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Mr. Durham: Yes. Our position is that the Act, as I have read it, intended to give that veteran his job, the job he held when he was inducted, and to guarantee him that job for the period of a year, unless such a condition would be impossible or unreasonable in so far as the employer is concerned. That is our position. We say that, if the employer has still a job available for a man with this man's qualifications and he comes back and asks for that job, he is entitled to it even if he has to replace some non-veteran who may have greater seniority than he. Here we are dealing with a statute that Congress has enacted and we have to take it as it is enacted and, if that is one of the effects
155 of it, it is up to Congress to make what appropriate revision of the law is necessary.

The Court: Mr. Smith, what is your answer to all this?

Mr. Smith: If your Honor please, this company, as you are aware, is engaged in the repair of ships and up to the present time over 600 of its employees have gone into the armed services and many of them have returned and have been put to work. We expect many more will be returned and we hope to put them to work. However, Congress has set up this law referred to by Colonel Durham, the Selective Training and Service Act of 1940, defining the rights of the returning veterans and the obligations of their former employers. There is some ambiguity, evidently, in this law. This has been recognized by the United States Attorney General, who has instructed his local districts,
156 when a case of this type had come into their office, they were to put before the Court all the facts on both sides of the case. In a sense the company in this case intends to take the same attitude. It is not in here in the usual position of the defendant and it does not wish to put in a defense in the legalistic sense of the word. It wishes to have this matter heard so that we can get on with our work. It has no particular interest as to the type of adjudication involved here.

The Court: What is your reason for not taking them?

Mr. Smith: There are two interpretations of this law up to the present time. Under the Act this Court is the only competent authority to actually interpret the law. The Selective headquarters has interpreted the law to be that this veteran and all veterans in similar categories are entitled to what they call super seniority; that is, as Mr. Durham explained, he must be kept at work if there is a job to be done in his department for which he is capable. Under our present contract with the Union this veteran, as other veterans, are entitled to what you might term accumulated seniority; in other words, for the time they have spent in the armed service they are entitled to accumulate their seniority as though they had never left the company and, when they come back here, granted that seniority

The Court: That question is not before me, is it, the accumulated seniority under the contract of the Union with you? Is that question before me?

Mr. Smith: The National War Labor Board, through its arbitrators, and the Department of Labor and the unions have taken the position that the meaning of the Selective Training and Service Act is that this employee must be given his accumulated seniority, but no more.

The Court: You mean that, in effect, gives him the accumulated seniority that is set forth in the contract with the Union?

Mr. Smith: That is correct, and no more. In other words, the Act and the contract do not disagree in any way. The language is somewhat different but the purport is the same.

The Court: I do not quite follow that. The Act says he must be given a like seniority. Would that mean the seniority he had when he left?

Mr. Smith: That is correct.

The Court: How could you put the interpretation, if he waited for a year he would be entitled to go back and have

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an accumulated seniority the contract sets forth? It might run from an ordinary mechanic up to a superintendent if he was away long enough.

Mr. Smith: No. You cannot go ahead of your place or seniority. If you are steadily employed, you remain in that position, and, as employees either leave the company, die, or are discharged, or for any reason leave the company's employ, then you move up, and only under those circumstances. This employee was moved up by the company as those circumstances took place all the time he was in the armed service.

The Court: Is there any real issue of facts?

161 Mr. Smith: I don't think there is, your Honor.

The Court: Have you attempted to draw any stipulation?

Mr. Durham: No, but I think we could very quickly.

Mr. Smith: I think I could read into the record a stipulation that would satisfy Colonel Durham and satisfy myself.

The Court: You have an intervenor here.

Mr. Goldstein: You will have to satisfy me. I am sorry.

Mr. Smith: I think you will be satisfied, too.

Mr. Durham: I thought if we took the complaint and went right down through it, we could stipulate practically everything, and Mr. Fishgold is here to testify to anything we cannot agree on.

Mr. Smith: The main objection of the company to the
162 wording of the complaint——

The Court: I don't think you can do it that way. I think if the Colonel will start in to read what he would like stipulated, and then you men both can signify whether you agree or not. Maybe you will agree to everything he wants.

Mr. Durham: I am going to follow the complaint. I would like it stipulated that the plaintiff is a resident of the Borough of Brooklyn.

Mr. Smith: I have no objection.

Mr. Goldstein: I have none, either.

Mr. Durham: Paragraph 2 is admitted, that at all times the defendant was and still is a domestic corporation organized and existing under and by virtue of the laws of the State of New York.

Paragraph 3 is admitted, that at all times hereinafter mentioned the defendant was and still is engaged in the business of constructing and repairing naval and other vessels of various types at its shipyard at the foot of 23rd Street, Borough of Brooklyn, City and State of New York.

Paragraph 4 is denied in part. I would like it stipulated that prior to the 22nd day of May, 1943, plaintiff was employed by the defendant as a welder in a position other 164
than temporary at its plant in the Borough of Brooklyn.

Mr. Smith: As to that, if your Honor please, we will admit that he was employed by the defendant as a welder for several months prior, but I think the legal effect of the word "temporary" should be decided by the Court.

Mr. Durham: Will you stipulate he was employed steadily for a period of seven months?

Mr. Smith: I will.

Mr. Durham: Is that correct, Mr. Fishgold?

The Plaintiff: Yes.

The Court: That stipulation is made in conformity with the claim of the defendant. Whether that means, as set forth in the paragraph, temporary or permanent is for the Court.

Mr. Smith: That is right. 165

Mr. Goldstein: May I ask here will there be produced proof before the Court, Mr. Smith, as to the number of other employees who prior to May 1943 were inducted into the armed forces?

Mr. Smith: We do not intend to submit any proof.

Mr. Goldstein: The construction Mr. Durham is contending for is one that has been made by the Selective Service Administration and they have given their definition

also of what they contend constitutes a temporary employee. They say a person who is employed in the place of a departed employee, departed into the armed forces, is a temporary employee. Now, I don't know whether under that interpretation Mr. Durham wants to assert that Mr. Fishgold, the plaintiff here, was or was not temporary insofar as——

The Court: I think I see what you mean. Will you concede, Mr. Smith, that when this plaintiff left and another employee was taken in his place by the Sullivan Company——

Mr. Goldstein: That is not my point, if the Court please.

167 The Court: That is my point.

Mr. Smith: We have hired other employees to do his work.

The Court: You took in other employees to do the work that he was doing.

Mr. Smith: That is correct.

Mr. Goldstein: The next concession I should like to have in the record would be the concession that prior to the 22nd of May, 1943, when the plaintiff was inducted, other employees of the corporation's welding department had been inducted in the armed forces and that the occasion for the plaintiff's employment, was, in part, the need to fill their places.

Mr. Smith: I couldn't stipulate that, because I have not made an investigation along those lines.

168 Mr. Goldstein: You could find out by calling your personnel department as to whether other members of the welding department had been inducted prior to May 22, 1943.

Mr. Smith: That would have to be done.

The Court: You had better make a note of that. We cannot have another hearing, but stipulate to it in writing and make a note to check that. He said in the opening some 600 different employees had gone into the service. I

don't know that your point is very important or not to me. What is important to me is whether it was temporary or not, whether another person took his place or not. If another person took his place, it would be pretty good proof it was not a temporary position that he left. Temporary positions, when people leave, so to speak, are not really filled, are they?

Mr. Durham: Paragraph 5th, that on or about May 22, 1943, plaintiff was inducted into the armed forces of the United States under the provisions of the Selective Training and Service Act of 1940, as amended, for training and service, and that on or about such day, in order to perform such training and service, he left his position of employment with said defendant.

Mr. Smith: I have no objection.

Mr. Goldstein: No objection.

Mr. Durham: Sixth, thereafter plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which date he was honorably discharged therefrom with a certificate that he had satisfactorily completed his period of training and service. I would like to offer in evidence the certificate of honorable discharge, the original, and leave a photostatic copy for the record.

The Court: Is there any objection to the photostatic copy being introduced in evidence instead of the original?

Mr. Smith: No objection.

Mr. Goldstein: None.

(Copy of certificate of discharge of plaintiff received in evidence and marked Plaintiff's Exhibit 1.)

Mr. Durham: Seventh, that within 40 days after his discharge from the Army of the United States and on or before the 21st day of August, 1944, the plaintiff applied to the defendant for reinstatement in his former employment with the defendant and that at the time of making

such application he was qualified to perform the duties of the position he had formerly occupied.

Mr. Smith: No objection.

Mr. Goldstein: None from me.

Mr. Durham: That on or about August 25, 1944, defendant restored plaintiff to his former position, but thereafter, and from time to time the defendant, without cause, and contrary to the provisions of the Selective Training and Service Act——

The Court: In your stipulation of facts, my suggestion is to keep away from any legal implications. Let us get the facts.

173 Mr. Durham: Thereafter, and from time to time the defendant laid off the plaintiff from such employment and refused to permit him to work in its employment on the following days, namely, April 9th, 10th and 11th, May 17th, 18th and 19th, 20th, 21st, 22nd, 23rd and 24th, 1945, and that on each of such days the plaintiff's wages, had he been employed by the defendant, would have amounted to a minimum of $9.60 for eight hours of work.

Mr. Goldstein: I object to that. The ground for my objection is to only one rather narrow portion of the offer made by Mr. Durham. I object to the use of the phrase "laid off", because I think it represents a conclusion both of fact and of law. I do not know whether I am speaking the piece that Mr. Smith should now speak, but I also should object to the phrase, "refused to permit him to
174 work." I would have no objection to the stipulation if it were amended as follows, everything as Mr. Durham spoke it except that we would say "and from time to time the defendant did not assign the plaintiff to work in its employment on the following days." You will see the reason for that, if the Court please.

The Court: I really do not.

Mr. Goldstein: When we describe the method of operation of the plant and the method of job assignment from day to day.

175

The Court: I think it is six of one and half a dozen of the other. The part of the statute he is apparently trying to invoke here is that the work for a year is guaranteed; rain, shine, or what have you, he is supposed to have it. No matter what the reason for laying off is, if he is not ill and can work the defendant is supposed to have him working.

Mr. Durham: So long as it is not impossible or unreasonable for the employer.

Mr. Goldstein: My objection is not at all aimed at any reason. As a matter of fact, the paragraph read by Mr. Durham——

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The Court: Is there any objection?

Mr. Smith: I have the same objection as Mr. Goldstein. I think as it develops here a little further, you might get a little better idea of the reasons for it.

The Court: Have you any suggestion?

Mr. Smith: If he changes "laid off" to "shaped up" I will have no objection. I have an objection to the two days April 10th and May 20th.

The Court: You will agree to nine of the eleven days. You agree to every day except April 10th and May 20th. You agree, on the days set forth in paragraph 8, that the defendant did not provide work for this plaintiff. Is that right?

Mr. Smith: I would have to insist on the use of the words "shaped up".

177

The Court: What does "shaped up" mean?

Mr. Smith: I intend to bring that up later. It requires a lengthy explanation.

The Court: Let him come up here and we will swear him, and we will take this proof as we go along.

ABRAHAM FISHGOLD, the plaintiff, called as a witness in his own behalf, having been first duly sworn, testified as follows:

The Court: Do you mind if I do it my way?

Mr. Durham: No, sir.

*By the Court.*

Q. On April 9th did you appear at the Sullivan Shipyards for work? A. Yes, sir.

Q. Were you given work? A. No.

Q. On the 10th, the same thing? A. That is right.

179 Q. Were you given work? A. No, sir.

Q. The 11th? A. No, sir.

Q. Were you given work? A. No, sir.

Q. You were there ready to do work; is that right? A. Yes, sir.

Q. On those three days? A. Yes, sir.

Q. The same thing happened on May 17th? A. That is right.

Q. And May 18th? A. That is right.

Q. And May 19th? A. That is right.

Q. May 20th? A. That is right.

Q. May 22nd, 23rd and 24th, 1945? A. Yes, sir.

Q. In other words, you were perfectly fit on each one of those days; you presented yourself for work and you

180 asked them for work and the company did not provide you with any work; is that right? A. Yes, sir.

Mr. Durham: Defendant's plant was in operation and other employees possessing the same or comparable skill and experience of the plaintiff were continued at work by the defendant.

Mr. Smith: That is true on every day but May 20th.

The Court: You have stipulated on every day but the 20th; is that right?

Mr. Smith: That is correct.

The Court: Why don't you stipulate the 20th?

Mr. Smith: It was a Sunday and nobody worked.

Mr. Durham: That is all right. We won't make any point of that.

The Court: Yes, that was a Sunday. Do you agree to take that out?

Mr. Durham: I am not going to make any point of it.

The Court: All right. May 20th they take out.

Mr. Durham: The 10th is a legal point. 182

The Court: Well, you cannot stipulate that.

Mr. Durham: No. The second cause of action is also of that nature.

The Court: Is it agreeable the same facts are stipulated in the second cause of action?

Mr. Goldstein: It is agreeable so far as I am concerned.

The Court: Do you want to add anything in the second cause of action to that which has already been stipulated?

Mr. Durham: I want to add paragraph 14th, that plaintiff protested to the defendant against being laid off by the defendant, but the defendant continued and does still continue to lay him off from time to time when there is not sufficient work to occupy all of the employees of the defendant holding positions similar or comparable to that of the plaintiff. 183

Mr. Smith: In the first place, we still make that distinction between laying off and shaping up, and I want to go further and state this employee is presently working for the company and has been for some time past.

Mr. Durham: We do not claim any other days than those mentioned in the previous testimony of the witness.

The Court: Those are the only days you claim. Then I think that the rest of that is unnecessary.

*By the Court.*

Q. Are you now working for the company, Mr. Fishgold? A. Yes, sir.

Q. And the only days you claim they did not provide you with work are the days you just testified to, and you have agreed to exclude May 20th? A. That is right.

185 Q. And since that time you have had steady work? A. That is right.

The Court: What do you need anything else for?

Mr. Durham: I wanted the protest.

The Court: He does not have to protest, does he?

Mr. Durham: Very well.

The Court: He is either entitled to it under the statute or he is not. I don't think you have to add to what you are entitled to under the statute. It is a statutory provision.

*By the Court.*

186 Q. You were not paid for those days you testified to? A. No, sir.

Mr. Durham: I would like the defendant to produce a letter received from the representative of Local No. 13, dated March 16, 1945.

(Mr. Smith produces letter.)

Mr. Durham: I offer that in evidence.

Mr. Goldstein: Are we proceeding with proof or with a stipulation?

187

The Court: Both proof and a stipulation. I think in this way we will get along faster. Wherever the fact cannot be conceded we will take the plaintiff's evidence on it.

Mr. Durham: I would like the stipulation that——

The Court: Have you offered that in evidence?

Mr. Durham: I offer this in evidence, the letter of John J. King, business agent of the Brooklyn Local No. 13 of this union, making a protest.

The Court: May I see it?

(Mr. Durham hands paper to the Court.)

Mr. Goldstein: No objection.

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(Letter dated March 16, 1945, from Local No. 13 to the defendant, received in evidence and marked Plaintiff's Exhibit 2.)

The Court: Is there anything more you want, Colonel Durham?

Mr. Durham: No, sir.

The Court: As I figure it, in view of the elimination of May 20th, the judgment of $115.60 which you request must be reduced by $9.60. Is that right?

Mr. Durham: That is correct.

The Court: So that you would be entitled to a judgment of $106; is that right?

Mr. Smith: I do not want to quibble over a few dollars, but I think there is another date out of there. I think the Colonel agreed there were only nine days. April 10th the date is. Our records indicate that he worked on that day.

189

*By the Court.*

Q. Do you remember that? A. It is pretty far back.

Q. That is why their records might be much better than your memory? A. Yes, sir.

The Court: Do you want to take April 10th out?

Mr. Durham: We won't make any point of it.

The Court: $96.40?

Mr. Durham: We also request a declaratory judgment that the defendant be specifically required——

The Court: Wait, Colonel. I want to get your facts. Are those all the facts that you want to present to the Court, or are there more?

Mr. Durham: Those are all the facts.

The Court: Have you any facts to present?

Mr. Goldstein: A considerable number, sir. I presume Mr. Smith, however, will want to go ahead before
191 me and his doing so will perhaps save my putting in some facts.

The Court: Have you any facts you want to put in?

Mr. Smith: I have, and I think most of them can be stipulated.

The Court: What are the facts you want to stipulate?

Mr. Smith: If I may read this. It may divert somewhat from the actual answer in which I set forth a complete defense and affirmative defense.

The Court: Are you following your answer?

Mr. Smith: I do not intend to exactly, your Honor. That after a hearing before the National Labor Relations Board and an election had thereon, Local 13 of
192 the Industrial Union of Marine and Shipbuilding Workers of America, CIO, was, on February 20, 1942, certified by the National Labor Relations Board pursuant to the National Labor Relations Act as the exclusive bargaining representative for all the defendant's production and maintenance employees, including welders. That pursuant to the certification of February 20, 1942——

The Court: Wait a minute. Is that conceded?

Mr. Goldstein: It is, so far as the intervenor is concerned.

Mr. Durham: Just a minute. The plaintiff will concede that without admitting that it is material.

The Court: That is not the point at the moment, Colonel. The point is to get a stipulation of the facts if we can. Then what importance those facts have on the case at issue we can subsequently agree on. I might agree with some of you and disagree with some, but I would like to have everything you want to put in the case first. Just make the record complete.

Mr. Smith: That pursuant to the certification of February 20, 1942, and the National Labor Relations 194
Act, the defendant was obliged to and did enter into a labor agreement with Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, CIO, which agreement, among other things, contained the following provisions.

Mr. Goldstein: I would be ready to stipulate to that. May I make the suggestion that we give the Court for the record the date of the execution of the contract, April 6, 1942?

Mr. Smith: Any employee, other than a probationary employee, who volunteers for or is drafted into the naval or military service of the United States shall retain his length of service standing and shall have the time spent by him in such service count towards his
length of service standing. The employee so volun- 195
teering or drafted must give the company notice in writing of his intention to so leave his employment. Any such employee who within 40 days of release or discharge from said service applies for reemployment shall be rehired, provided he is fit for duty and work is available. The availability of work will be determined in accordance with length of service and ability.

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If reemployed, the said employee shall receive the then current rate of pay for the job for which he is reemployed. That on or about May 17, 1944, the defendant entered into a new agreement with Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, CIO.

Mr. Goldstein: Possibly we can put the record in a more logical and chronological state, if you also read the other provision, which might be pertinent.

Mr. Smith: I would rather do that next, if you don't mind.

Mr. Goldstein: All right.

197 Mr. Smith: That on May 17, 1944, the defendant entered into a new agreement with Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America, CIO, containing the following provision: Any employee, other than a probationary employee, who is drafted or volunteers for naval, military or merchant marine service with the United States shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count towards his seniority as if he were actually and continually employed by the company. Any such employee who volunteers or is drafted, must give the company notice of his intention to so leave his employment. Any such employee who within 40 days after his release or
198 discharge from said service applies for reemployment shall be rehired by the company provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, the said employee shall then receive the then current rate of pay for the job for which he is reemployed.

Mr. Durham: I will agree to that.

Mr. Smith: That by order of the National War Labor Board Shipbuilding Commission, dated February 25, 1944, the following provision was included in the contract between the defendant and the Industrial Union of Marine and Shipbuilding Workers of America, Local 13, CIO: "Promotions and reclassification and increases or decreases in the working force shall be based upon length of service and ability to do the job. Whenever between two or more men ability is fairly equal, length of service shall be the controlling factor."

I would like to put in evidence the directive order containing that provision.

Mr. Durham: No objection.

Mr. Goldstein: No objection.

Mr. Smith: The date is February 25, 1944.

(Order of National War Labor Board Shipbuilding Commission dated February 25, 1944, received in evidence and marked Defendant's Exhibit A.)

Mr. Smith: That on or about August 25, 1944, the said labor agreement contained and at the present time does contain the following provision: Should any difference arise between the company and the union with respect to any grievance or with respect to the meaning or the application of any of the provisions of this agreement, they shall be disposed of between the parties hereto and an earnest attempt shall be made to settle such differences within a reasonable time as hereinafter provided. In the event that a dispute shall not be settled satisfactorily between the union and the company, said dispute shall be submitted to arbitration. If within five days after the date of the decision of the company with which the union disagrees, the company and the union cannot agree upon an arbitrator, the National War Labor Board shall be asked

to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters so arbitrated under the within contract shall be limited to the interpretation and application of the said contract.

The Court: How many more of those have you got?

Mr. Smith: I have no more provisions of the contract to read.

The Court: How do the provisions of the contract between your company and this union apply here?

Mr. Smith: Under this contract——

The Court: All I am asked to do is interpret this
203 Selective Service Act. Now, assume that your company and this union, this Local 13, have an agreement which is different than the Selective Service Act. I am not calling upon you to interpret that, but would you agree to that conclusion that I have just made?

Mr. Smith: Not quite, your Honor, in this respect: this contract was entered into——

The Court: No. Suppose we do not take this contract. Suppose a contract of any kind is different from the Selective Service Act. Which do you think I would have to apply?

Mr. Smith: I think you would have to apply the Act, but the company was put in this position.

The Court: You do not agree to that?

Mr. Goldstein: I would not quite agree to that, be-
204 cause there might very well be a constitutional question as to whether there had been an Act passed under circumstances and with authority such as would warrant the impairment of the obligation of a contract, but I don't think that is before you.

The Court: I am of the opinion at the moment, sir, that if the Selective Service Act was different than your contract in any way, I would still be bound to apply the Selective Service Act, even though you have

done more under that contract, or vice versa, if you did less he would get more under the Selective Service. It makes no reference to the National Labor Relations Board or to the union or anything. The Congress apparently took the bit in its teeth and said, "We are going to set the line and nobody will apply anything to affect it except Selective Service."

Mr. Goldstein: You have the problem of the construction of the contract on another ground. What the Act says is that the reemployed veteran must be restored to his job, or a similar one, without loss of seniority. Now, just what did Congress intend there? It is our contention Congress intended to give the veteran precisely that which he would have had had he not left the employ of the company. 206

The Court: No, I don't think so. Offhand I would say no. I would say that what Congress intended to do would be the logical thing. Here is a man who left a job which paid him $9.60. Now, that same job should be there for him when he came back, and, if he was away nine years, we will say, if your construction is right, then, by absence in the army, he could come back a superintendent.

Mr. Goldstein: No, no.

The Court: He could be if your argument held. Seniority accumulated until he got up to that point. I am not certain of that.

Mr. Goldstein: The Act, of course, does not define the word "seniority" as used there. You are going to have to look elsewhere to find the meaning of that term than the Act. 207

The Court: Seniority can only mean one thing in my mind, that he is assured of the same job he had when he left, without any ups or downs.

Mr. Goldstein: I think Congress was a bit more generous than that.

The Court: He cannot improve himself, but he cannot be any worse off. I think that is logical.

Mr. Smith: That is what happened in this case. If he had not gone into the army he would be in the same position.

Mr. Goldstein: The thing is to determine whether or not he is getting what Congress wanted him to get.

The Court: What else have you? Put in all in the record you think would help me.

Mr. Smith: That on or about August 25, 1944, the defendant restored the plaintiff to his former position and employment and the plaintiff has since that date
209 been and still is employed by the defendant, although from time to time between August 25, 1944, and the present date, due to the exigencies of production and the periodic drop off of available work, plaintiff has been shaped up pursuant to the provisions of the aforesaid labor agreement.

Mr. Durham: There we come to that same difficulty again.

The Court: You cannot concede that, because that is a matter for the defendant to put to proof. I don't know what "shape up" means. It may have one meaning down at the docks and another meaning here. I think, if you want to put in any proof as to that, you will have to call witnesses. A witness may go on the stand and say "Well, there wasn't any work for
210 this man." They might have wanted work for others. It might be under the statute they should have let the others go and shaped him in and shaped the others out. I don't know. I don't think you can concede that. I will give you a chance to put in any proof you want to. Make a note of that.

Mr. Smith: That on or about March 31, 1945, the plaintiff herein was permitted to work in the defend-

ant's plant although its employee G. Jackerson had shaped up.

The Court: Who was he?

Mr. Smith: He was the instrument through which this question got before the War Labor Board. It was this employee who had more seniority than Mr. Fishgold, who originated this case into the War Labor Board.

The Court: You had better give me some proof on that. That might be a very important question.

Mr. Smith: I don't think there is any question on that.

Mr. Durham: I know nothing about it one way or the other, except what you told me.

Mr. Smith: It is noted in the arbitrator's award, which I think you have a copy of.

The Court: I will want proof on that, too.

Mr. Smith: All right. That on or about April 2, 1945, Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America filed a written grievance with the defendant pursuant to the terms of the aforesaid labor agreement. Said grievance, in effect, protested the action of the defendant in shaping up the said G. Jackerson and permitting the plaintiff to work in his stead.

Mr. Durham: I know nothing about it.

The Court: That would not hurt you.

Mr. Durham: No. The protest I offered was the one of March 16th.

The Court: You had better give me some proof on that.

Mr. Smith: All right.

Mr. Goldstein: There were many things that we didn't know that were alleged in the complaint which we conceded.

The Court: This question is very important.

Mr. Smith: Of course, the next one Colonel Durham would not know anything about, either. There is no sense in going on if he is not able to concede the facts.

Mr. Goldstein: I would like to ask Mr. Smith something on this.

(Mr. Goldstein confers with Mr. Smith.)

Mr. Goldstein: I think Mr. Smith covered most of the points I would have made, with the possible exception of one or two. It does not appear from the stipulation offered by Mr. Smith that a certain paragraph of the contract——

215 The Court: Why don't you offer the whole contract in evidence? Have you got the whole contract here?

Mr. Goldstein: Yes, with a lot of other material in it. There is just one short paragraph I want to prove existed at the time the plaintiff was inducted. In the contract of April 6, 1942, which remained in effect until the date a new agreement was signed, namely May 17, 1944, there was contained the following provision: "In all cases of promotion, increase or decrease in the working force, the total accumulated length of service and ability to do the job shall be the basis for any such promotions or increases or decreases in the working force."

Mr. Durham: No objection.

Mr. Goldstein: One further supplementation of a
216 portion of Mr. Smith's offer; that is, I think it was purely an oversight on his part he did not mention it, and that is that the clause on military service which he read out of the contract of May 17, 1944, was, equally with the other clause which he read into the record out of that contract, ordered by the National War Labor Board and the Shipbuilding Commission to be inserted in the contract.

Mr. Durham: You are referring to the contract of April 6, 1942?

Mr. Goldstein: No; of May 17, 1944.

Mr. Smith: There are just one or two more here.

The Court: Go ahead.

Mr. Smith: As a result of the protest by the union, the question went to arbitration and an arbitrator was appointed by the National War Labor Board, who heard the case and decided it in favor of the union.

Mr. Durham: I have no objection to that if it is made to appear that the plaintiff was not a party in any way to the arbitration. He was not even notified of it. 218

The Court: Who is Jackerson? How does he enter into this?

Mr. Smith: He is, as you might say, one of the employees.

The Court: A welder, too?

Mr. Smith: A welder who had more seniority than the plaintiff in this case, whom we shaped up, you might say, to put Mr. Fishgold, the plaintiff, to work. We did that at the request of the Selective Service Headquarters.

The Court: You had better made that a little clearer. You had Jackerson working for you?

Mr. Smith: Jackerson, yes.

The Court: Was Jackerson at any time in this war? 219

Mr. Smith: Not to my knowledge, no.

Mr. Durham: He was a non-veteran.

The Court: Now, when Fishgold came back, was Jackerson still working for you?

Mr. Smith: He was.

The Court: What relation has Jackerson got to Fishgold?

Mr. Smith: Selective Service Headquarters in New York City made an interpretation of this law and they

told us that under the law a returning veteran was entitled to superseniority, and I think your Honor has had that explained to you already this morning.

The Court: Yes.

Mr. Smith: That would mean that in this case the plaintiff would be entitled to work regardless of who else worked or did not work. This employee Jackerson had greater seniority than the plaintiff, and in the ordinary course of events on certain particular days Jackerson would have worked and Fishgold would not have worked. That is pursuant to the terms of the contract. However, because Selective Service Head-
221 quarters had asked that we keep the veteran at work, we did so, regardless of the terms of the contract.

The Court: You mean the terms of the contract with whom?

Mr. Smith: With the union.

The Court: With Local 13?

Mr. Smith: That is correct. As a result, the union filed a grievance, or a protest.

The Court: To what effect?

Mr. Smith: That the plaintiff in this case should not have worked on a certain particular day, or days, and that Jackerson should have worked. As a result of that protest, the grievance was heard by the company's representative and decided in favor of the vet-
222 eran.

The Court: Of Fishgold?

Mr. Smith: Of Fishgold against the union.

The Court: Against the union's protest?

Mr. Smith: That is right. Under the provisions of the contract, the union then had a right to go to the War Labor Board.

The Court: Did they?

Mr. Smith: They did. An arbitrator was appointed and he decided the company should not have shaped

up Jackerson but should have shaped up Fishgold on those particular days. There were several other employees involved, too, and the company had reimbursed those employees although they did not work and this veteran did work.

The Court: So that all along the line Fishgold won out, even against the protest of his own Local 13?

Mr. Smith: As far as the company was concerned, he did, but the War Labor Board stepped in and made a contrary decision.

The Court: The Labor Board sustained Fishgold?

Mr. Smith: No; they sustained the union.

The Court: They sustained Jackerson? 224

Mr. Smith: That is correct, and the union.

The Court: You just said that Fishgold was sustained by the Labor Board. You mean Jackerson was sustained?

Mr. Smith: That is correct.

The Court: I can see you were kind of caught in the middle there.

Mr. Smith: That is what happened.

The Court: When you try to please both sides you wind up pleasing nobody.

Mr. Smith: That is what happened.

The Court: Tell me this. There has been a Selective Service interpretation of this whole thing, hasn't there?

Mr. Smith: There has been a National War Labor 225 Board interpretation.

The Court: Have you ever had any court interpretation?

Mr. Smith: This is it.

The Court: This is the first case.

Mr. Goldstein: I am informed there is now pending in the District Court in Detroit a similar case.

Mr. Smith: I don't think it has reached the same position as ours.

The Court: All right. What else is there?

Mr. Smith: I would like to read in evidence the decision and opinion of the arbitrator of the National War Labor Board.

The Court: That you can cite in your brief.

Mr. Smith: It is in my pleadings, your Honor.

The Court: That is a part of the law. Now are there any other facts?

Mr. Goldstein: I don't quite know where we are with this recital Mr. Smith made as to the occasion
227 for the shaping up of Mr. Fishgold, and then failing to shape him up and then shaping him again.

The Court: Do you want to bring someone here to testify tomorrow morning about some of those stipulations which could not be conceded?

Mr. Smith: I myself could testify as to the proceedings between the Union and the defendant and the proceedings with the War Labor Board.

The Court: You said something about shaping up.

Mr. Smith: I have a witness here now who can explain that.

The Court: Then put him on.

Mr. Smith: I would like to put him on in the usual course after the plaintiff has finished his case.

The Court: Have you rested your case?

228 Mr. Durham: No, I have not. I would like to offer in evidence Local Board Memorandum No. 190-A issued by National Selective Service Headquarters, dated May 20, 1944, with reference to two or three paragraphs. They are rather short and perhaps it would be better for me to read them into the record rather than submit this whole memorandum.

Mr. Smith: I have no objection to the Court being apprised of those Selective Service Headquarters

memoranda, but I do object to them being placed in evidence. I do not see the relevancy.

Mr. Goldstein: I join in that objection.

The Court: I am not bound by it. It might be helpful to me in deciding this issue, but I am not bound by it at all. You can refer to that in your briefs.

Mr. Durham: I would also like to offer in evidence a portion of the hearings before a special subcommittee of the Committee on Military Affairs of the House of Representatives.

The Court: That is a matter of law, too. Just put that in your brief. That is not a fact. That is a legal matter that belongs in your brief.

Mr. Durham: Then I can quote from this memorandum?

The Court: Oh, sure. You can quote from anything. You can quote from the Bible if you wish. That is always a safe thing to quote from. Have you rested?

Mr. Goldstein: No. I would like to clarify the state of our record. Mr. Smith made a statement of facts which I think should be a part of the record, namely, as to how it was Mr. Fishgold at first was shaped up, and then, by reason of the protest or intervention of this Selective Service Board in town here, the company gave him work in preference to Jackerson, who had greater seniority; and the further statements made by Mr. Smith that subsequently the Union protested, and the company decided the protest in favor of Fishgold, and subsequently there was this arbitration proceeding by an arbitrator delegated for the purpose by the National War Labor Board with the resulting opinion and award which are attached to the defendant's answer. Now, I think all of that ought to be part of the record.

The Court: It is a part of the record. That is all in the record.

Mr. Goldstein: Is that stipulated?

Mr. Smith: Yes.

Mr. Goldstein: There is one document, if your Honor please, we do not have in the record, which is actually a part and parcel of the arbitration proceeding, and that is the agreement of submission, which poses the question which was decided.

The Court: Who agreed to that?

Mr. Goldstein: The corporation and the Local Union.

233 The Court: The Local Union and the corporation agreed to the arbitration?

Mr. Goldstein: They stipulated what was the question involved and submitted it for determination.

Mr. Durham: My objection to it is that the plaintiff is not a party to it.

The Court: It is not binding and what is not binding cannot hurt.

(Paper received in evidence and marked Exhibit B.)

The Court: Do you rest?

Mr. Goldstein: Just one question, sir. I understand you will consider the copy of the statement of the case and opinion of the arbitrator and award of the arbitrator as being in evidence, a copy of which is attached to
234 the corporation defendant's answer.

The Court: Yes. You can consider them as all being in evidence. You can refer to them in your brief as though they were in evidence. What conclusion I reach from them and what conclusion you reach is another thing. I want everything in the record which anyone thinks will help in this trial. The whole thing is in the record. I do not want to exclude anything which might be helpful. You understand that.

Mr. Smith: That is true, and that is what I want.

The Court: Now the intervenor rests. Is that right?

Mr. Smith: Your Honor, I have not rested.

The Court: No. We are coming to you. The plaintiff has rested and now I want to know if the intervenor rests, and then you will have to rest some time.

Mr. Goldstein: I rest insofar as any possible stipulations for the record can be arrived at. There will have to be proof, both from Mr. Smith's client and perhaps from myself, of the shape-up and the order in which Fishgold was shaped up, and so forth. I take it we are ready to proceed with that. There is also 236
proof to be submitted as to the seniority standing of Jackerson and Fishgold's relation to that.

The Court: The only question is the meaning of the word "shape-up".

Mr. Smith: And the seniority of Jackerson and Fishgold.

The Court: When do you want to proceed?

Mr. Smith: I am ready to go ahead right now. Am I to understand Mr. Durham is not putting Mr. Fishgold on the stand as his witness?

Mr. Durham: He has been on.

The Court: He has been on. You can cross-examine him if you want.

Mr. Smith: May I? 237

The Court: Go ahead.

*Cross-examination by Mr. Smith.*

Q. Mr. Fishgold, are you still employed by Sullivan Dry Dock and Repair Corporation? A. Yes, sir.

Q. Were you ever discharged by that corporation? A. I was laid off.

238 *Abraham Fishgold—Plaintiff—Cross.*

Q. Do you know the meaning of the words "shaped up" as is used in the shipyard? A. The only thing I do know is when I am not working. You may call it shape up or you may call it laying off, but the fact is I am not working that day or number of days.

Q. But you never call it discharge? A. You could call it a temporary discharge or something around there.

Q. Did your foreman ever notify you that your services were no longer needed? A. He did not.

Q. You were in attendance in the yard? A. For the following days, yes.

Q. For the following day? A. Yes.

239

The Court: The days you testified?

The Witness: Yes.

Q. Most of those days you received what I think is called a shape up slip; is that correct? A. That is right.

Q. I show you this slip of paper with the words marked in capital letters "Shape up ticket." Is that the type of ticket you received (showing paper to the witness)? A. Yes.

Q. I show you this pink ticket marked "Pay off slip." Have you ever received such a slip from any of your superiors at Sullivan Dry Dock & Repair Corporation (showing paper to the witness)? A. I don't recall that.

Q. You do not recall whether you ever received one?

240 A. That is right.

Q. Would you deny that you have ever received one? A. I cannot recall that. How could I ever deny it if I cannot recall it.

Q. Just a moment, Mr. Fishgold. I am asking you the question. Would you deny it? A. I said I cannot recall it.

Mr. Smith: May I ask that the witness be directed to answer the question?

The Court: No. That is a denial, in substance.

Mr. Smith: That is all.

Mr. Goldstein: May I put a question or two, please?

The Court: Yes.

*Cross-examination by Mr. Goldstein.*

Q. Mr. Fishgold, on these days when you stated that you were not given work, did you go to the United States Employment Service and apply for another job? A. No, I did not.

Q. Did you ask your employer for a release so that you could go and get other jobs? A. I did not need a release, being I am a veteran. 242

Q. Did you ask your employer for a release so that you could get another job? A. I didn't need a release.

The Court: Your answer is that you did not?

The Witness: No, I did not.

Q. Did you consider yourself discharged in the sense of having been permanently put off the payroll of the company?

Mr. Durham: I object to that as immaterial.

The Court: I will let him answer.

A. No. 243

Q. Did the employer continue making deductions for your Social Security and other taxes, income and so forth? A. At the time I was supposedly out of work?

Q. During the weeks in which you lost days from work. A. I guess they did it.

Q. It was shown on your pay check, wasn't it? A. I am saying that. They did.

Q. Then you do not guess. You know that the employer did that, don't you? A. Yes.

244 *Abraham Fishgold—Plaintiff—Cross.*
*William H. Leighton—For Defendant—Direct.*

Q. What is the usual procedure when a man is discharged in your plant? Have you ever seen a man discharged? A. I really don't know.

Q. Have you ever seen a man discharged? A. No.

Mr. Goldstein: That is all.

The Court: All right. Now, gentlemen, have you any other witnesses?

Mr. Smith: I think that was Colonel Durham's witness, your Honor.

The Court: That is right.

245 Mr. Durham: I have no more witnesses. The plaintiff rests.

The Court: Now it is your turn to proceed.

Mr. Goldstein: I think Mr. Smith will probably be able to save me the job.

The Court: I have to take it in some order.

Mr. Goldstein: I have nothing to prove at this moment until the employer defendant has proved certain things.

The Court: You have nothing at the present time?

Mr. Goldstein: At this moment I do not, sir.

The Court: Now, Mr. Smith, it is up to you.

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246 William H. Leighton, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

*Direct examination by Mr. Smith.*

Q. Mr. Leighton, are you employed by Sullivan Dry Dock & Repair Corporation? A. Yes, sir.

Q. In what capacity? A. Welding foreman.

Q. Were you the welding foreman on April 9, 1945? A. Yes, sir.

Q. And at all times since that date? A. Yes, sir.

Q. Was Mr. Fishgold in your department? A. Yes, sir.

Q. Mr. Leighton, have you ever given Mr. Fishgold what is called a shape up slip? A. Yes, sir.

Q. Is this the type of slip that he received (showing paper to the witness)? A. Yes, sir.

Q. That is the form without being filled in by you? A. That is right.

Q. Did you ever give Mr. Fishgold a pay-off slip? A. No, sir.

Q. I show you this pink slip marked "Pay-off slip." Did 248
Mr. Fishgold ever receive that from you (showing paper to the witness)? A. No, sir.

Q. Will you tell the Court whether or not it is your duty to discharge employees? A. Yes, sir.

Q. That is, welders? A. As far as welders are concerned, I can discharge them, yes, sir.

Q. Have you ever discharged Mr. Fishgold? A. No, sir.

Q. Have you ever shaped up Mr. Fishgold? A. Yes, sir.

Q. Is Mr. Fishgold still working for the corporation? A. Yes, sir.

Q. Would you describe for the Court as best you can the meaning of the word "shape up"? A. Shape up is a written notice given to the man during that particular day he is working at his services that we do not have any work available the next day. 249

Q. When is he usually given this shape up slip? A. In the latter part of the afternoon.

Q. Some time in the afternoon? A. That is right; in other words, before he quits for the day he is given the slip.

Q. And that notifies him—is this correct—that his services might not be needed the next day? A. Just for the following day, yes, sir.

Q. Were there ever times, Mr. Leighton, when a shape up slip was given to an employee and his services were needed the next day? A. Definitely.

Q. Would you explain to the Court the procedure involved when a man is handed a pink pay-off slip, and what is the procedure involved after the man is handed the pink pay-off slip? A. The slip is made out according to the form telling the reason why he is paid off, and I sign the name and I send the discharge with this original pink slip.

Q. You mean that pay-off slip? A. Yes. I send him up to the personnel department and from then on he is handled by the personnel.

251 Q. Are you familiar with the procedure beyond that point? A. Yes. From then, before he goes up there, before he gets his pay made out, he has a release from the department and he is sent to the timekeeper and the timekeeper makes out a slip to pay off the man.

The Court: He is discharged, in other words?

The Witness: I give him the discharge. That is right.

The Court: He is discharged permanently when he gets the pink slip; is that right?

The Witness: That is right.

Q. None of those proceedings is involved when a man receives a shape up slip, is that correct, a white slip? A.
252 That is correct.

Mr. Smith: That is all.

*Cross-examination by Mr. Goldstein.*

Q. Mr. Leighton, the Sullivan Dry Dock & Repair Corporation operates a ship repair yard, doesn't it? A. That is right.

Q. Do you have a steady volume of work in the yard or does your work fluctuate from day to day? A. Since I have been down there for the last four years it has been very consistent, except for maybe one slack period. On the whole it has been very consistent.

Q. Normally in peace time or where you don't have the war rush of work, it has the same characteristics of availability of work as other ship repair yards, doesn't it? A. That is right.

Q. And what is that? Does that mean consistent work for the whole group of employees day in and day out? A. No, not for the whole group. For part of the group.

Q. This shape up, what is it? Why do you shape a man 254
up? A. That is made out in the afternoon previous to the following day. The men are all working at that particular time and as fast as we can find out if the following day we don't have work for say 20 men, we have to give shape up tickets to those 20 men.

Q. What do the 20 men who receive the shape up tickets in the afternoon do the following morning? A. Well, that is up to them, but they usually report to work at the regular time. If there is work, they go to work by regular seniority, but if they don't report for work, we naturally cannot put them to work.

Q. The shape up is merely a notice, then, that on the following day the job on which they have been working won't need them and they are not to report to that job? 255
A. That is right.

Q. If an employee is working in your yard and does not get a shape up, would he the following day report back to the vessel on which he had been working the day before? A. Not necessarily, no.

Q. He would report to whom? A. He would report to the welding department and from there be assigned to his job.

Q. But normally where would he be assigned if he had not received a shape up slip the day before? A. He would be sent back to the same job he had already been on.

Q. In other words, the same vessel which was being repaired? A. Yes.

Q. When he does get a shape up slip in the afternoon of one day, normally he will report the following day, being a welder, at the welders' shanty; is that it? A. That is right.

Q. Who meets him there? A. The foreman or the assistant foreman.

Q. What do they do? A. When the men report they
257 are marked; in other words, the day before the number of men shaped up are down on a separate pad, and as the men are shaped up, as the men come in, they make it a point to show that they are present, and all the men who have not been shaped up go to work, and, if we still have work available, we put men back to work that we gave shape up tickets to, according to their seniority and providing they were to work on time, and so forth.

Q. In other words, when you say "In accordance with their seniority" you mean the man who has been shaped and who had the greatest length of service with the corporation is first assigned to a job? A. That is right.

Q. And then the fellow with the next greatest length of service is assigned, until you have assigned as many of the shaped up men as you have work for on that day? A.
258 That is right.

Q. Suppose there are a couple of men who got shape up notices yesterday afternoon and come in today and you cannot put them to work. What normally happens? Do they come around again tomorrow? A. They usually come back the following day, yes, sir.

Q. And go through the same procedure? A. The same procedure.

Q. Do they have to fill out new applications for employment when they come in after a shape up slip has been given to them? A. No, sir.

Q. Do they surrender their identification badge when they are shaped up? A. No.

Q. They keep that? A. Yes.

Q. Are they required to remove their tools from the yard or from the shop when they are shaped up? A. No, sir.

The Court: It is a temporary matter, the shaping up?

The Witness: That is what it amounts to, yes, sir. 260

The Court: Do you know whether on April 9th, 10th and 11th and May 17th, 18th, 19th, 21st, 22nd, 23rd and 24th this man did not work? He testified he did not. Do you know whether he had work on those days?

The Witness: Some of those days he did not report for work.

The Court: I am not asking you that. I am asking you whether he had work on those days.

The Witness: We can check by the records.

The Court: It seems to me I need some proof here, Colonel, as to whether there was work on those days and when this man was shaped up what the reason for it was. The statute says unless the employer's circumstances have been so changed as to make it impossible or unreasonable to do so. Suppose on those days, Colonel, the Sullivan Shipyard had 20 welders working and suppose all 20 of them were world war veterans of World War II who have been in the army longer than he was. Would they be justified in shaping him up? 261

Mr. Durham: If all of them were World War veterans?

The Court: I have no proof showing that they were. I would have to have some proof explanatory of that last section.

Mr. Durham: There is one man here and I understood Mr. Smith was going to produce some evidence about him, this man Jackerson, who was a non-veteran. Now, this claim that Jackerson——

The Court: Was Jackerson working those days? I need some proof.

Mr. Smith: I would like to put in evidence these slips.

The Court: Yes.

(Shape up ticket and pay-off slip received in evidence and marked, respectively, Defendant's Exhibits C and D.)

The Court: Are you going to put Jackerson on?

Mr. Smith: I have his seniority list here and the head of the personnel department.

The Court: Suppose you go over that and we will take it up tomorrow morning. I need some proof as explanatory of that part that says that "Circumstances have so changed as to make it impossible or unreasonable." You need some proof on that in order to sustain your cause here.

Mr. Durham: I thought we had stipulated the plant was at work on those days.

The Court: They might have been all World War veterans with more service than him. He has a list of the men who worked those days. I am going to adjourn until 10.30 tomorrow morning. I would suggest that this afternoon you try to arrange a stipulation and, if you cannot, you will have to call personnel to prove there were men working that day who were not veterans or that he was senior to, because he was a World War veteran.

Mr. Smith: We can stipulate Jackerson was not a World War veteran.

The Court: Will you stipulate Jackerson was not a World War veteran and that Jackerson worked on all the days that this plaintiff did not work?

Mr. Smith: That I would have to check.

The Court: You need that.

Mr. Goldstein: May I interrupt just for a moment?

(Mr. Goldstein confers with Mr. Smith.)

Mr. Durham: That is not really my proof.

The Court: Yes, it is. You carry the burden of proving every part covered by the statute. Will you stipulate that in those days there were non-veterans working in that particular department that Fishgold worked in? 266

Mr. Smith: I so stipulate.

Mr. Goldstein: There is one further question we want stipulated. If your Honor please, I think the stipulation will cover our position perfectly if there are no further factual matters.

Mr. Smith: I still have one witness to put on.

Mr. Goldstein: We can get one further concession on that on the record, that G. Jackerson, who was one of the non-veterans who had work on the days Mr. Fishgold, the plaintiff, did not, was hired by the company on November 25, 1942. The plaintiff Fishgold was hired by the defendant corporation on December 21, 1942. 267

Mr. Durham: I would like to get into that last stipulation that those men, the non-veterans, were doing comparable work that Fishgold was doing.

Mr. Smith: It is so stipulated.

The Court: It is assumed they were doing the same kind of work that Fishgold would have done if he had worked.

Mr. Smith: Yes, your Honor.

268 *Fred Beattie—For Defendant—Direct.*

FRED BEATTIE, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

*Direct examination by Mr. Smith.*

Q. Mr. Beattie, how long have you been connected with the ship-repair business? A. I have been in this particular plant 26 years.

Q. 26 years? A. Yes, sir.

Q. Did you spend any time prior to that in the same business? A. Yes. I was five years on the other side and ten years sailing engineer.

269 Q. Are you a licensed engineer? A. Yes, sir.

The Court: Are you calling him as an expert?

Mr. Smith: I want to show his background, because I intend to show the background of the meaning of this word "shape up" and the reasons for it.

Q. Mr. Beattie, what is your position at the present time? A. Vice-president and general manager of the Sullivan Dry Dock Company.

Q. The defendant corporation? A. Yes, sir.

Q. Mr. Beattie, will you define for the Court the meaning of the word "shape up"? A. Shape up is the method through which we hire or dispense with the services of any man on any given day.

270 Q. Can you explain a little more specifically the procedure that is followed? A. Well, say a man is working today, or has been working for several days, on a particular job. The foreman has knowledge that that job will not be in existence the following day. He gives that man a shape up ticket which informs the man, if it does not so say the words, that his services will not be required the next day.

Q. How long to your knowledge, Mr. Beattie, has this system been in existence in the shipyards? A. It has al-

ways been in existence since I have come to this port 26 years ago.

Q. Is that system in all repair yards? A. Yes, that system is prevalent throughout the port.

Q. Can you give the Court some idea of the necessity for retaining such a system? A. At this particular time, if men come down to work the following morning and they do not shape up, they get stand-by pay for appearing at the plant. That avoids that charge. When we shape a man he can take a day or a couple of days off without appearing at the plant.

Q. Why do we have such a great fluctuation in the number of employees working on a particular day? A. That 272
is governed by the number of ships that come in or do not come in to any given plant.

Q. Is there a great fluctuation in the amount of ships? A. Yes. These days a convoy may be due to arrive and the convoy may be diverted, which has caused a great number of shape ups in a plant.

Q. Did that trend exist during the period involved in this case? A. It did.

Q. That is, in April and May of this year? A. Yes.

The Court: What I want to know is who does the shaping up and how it is arrived at. He wants 20 men tomorrow and he has got 60 today. He lets off 40 for tomorrow. How does he pick the 20 to come in and the 40 to be left out? 273

The Witness: He picks the 20 best suited for the work which he knows will be performed the following day.

The Court: In other words, if he needs 20 men tomorrow and he has 60 men today, he picks the 20 he thinks best suited for that work?

The Witness: The seniority is quite important and also the ability.

The Court: During this period of time did you g any notice from the Selective Service that a war Ve eran had to be given work? Did you give any thoug to that?

Mr. Smith: If your Honor please, Mr. Beattie do not do the shaping up himself.

The Court: You know something about what th policy of the company was?

The Witness: Yes, sir.

The Court: Did you give any thought to that clause

The Witness: That particular method was handle by Mr. Smith himself.

275 The Court: You did not handle that part?

The Witness: No.

Q. Mr. Beattie, in the case of the plaintiff, Mr. Fishgold did he receive every right that he would have receive had he not gone into the service?

The Court: If he did not shape him up, how coul he answer that?

Mr. Smith: He might know whether or not he re ceived his rights.

The Court: Any knowledge he has gained would b second handed. (Addressing the witness) Did yo shape him up?

The Witness: No, sir.

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Q. Before Mr. Fishgold went into the service, was th shape up conducted in a similar fashion? A. Yes, sir.

Q. The same reasons for men being shaped up?

The Court: We know all about being shaped up We have been hearing about shaping ups here for 2 years.

Mr. Smith: I want to show your Honor that before this plaintiff went away we did the same thing as we do now. 277

The Court: I have no doubt about the sincerity of the company in shaping up. The trouble is that we have a statute which we never had before. I know you have the contract with the Union on the one hand and you had the section on the other hand.

Mr. Smith: I am through, your Honor.

Mr. Durham: I have rested.

Mr. Goldstein: I take it the plaintiff has rested and the corporate defendant has rested.

The Court: That is right. Have you any proof? 278

Mr. Goldstein: The parties I represent will rest without submitting proof other than that already in the case.

The Court: Now you can make any motion you want.

Mr. Smith: I move to dismiss the first cause of action on the ground the plaintiff has failed to prove a prima facie case, and in that connection, your Honor——

The Court: I wish you would reserve all argument.

Mr. Smith: I want to call your attention to one case. I do not intend to argue either of the motions.

The Court: I will give you the chance, but I will tell you this is the way I am going to do it and then you will see what I mean. Off the record. 279

(There was discussion off the record.)

The Court: The motion is denied.

Mr. Smith: I make the same motion with respect to the second cause of action.

The Court: Denied.

Mr. Smith: I want to call your Honor's attention to the case of Kay against General Cable Corporation.

280 *Motion to Dismiss.*

That is 59 Fed. Supp. 358. In that case Judge Meaney decided——

The Court: Have you any motion?

Mr. Durham: All I ask is the relief asked in the complaint.

The Court: Have you any motion?

Mr. Goldstein: Yes. I move to dismiss the complaint both as to the first cause of action and as to the second cause of action on the ground respectively for each cause of action that neither the allegations nor the proofs have demonstrated the existence of a cause of action.

281 The Court: Denied.

Mr. Goldstein: Exception.

The Court: When do you want to submit briefs?

(There was discussion off the record.)

The Court: I go on vacation on the 30th. If you give me briefs on the 27th, I wish you would all appear here on the 30th and I will give you my decision. All briefs on the 27th; on Thursday, the 30th, at 10.30, the decision.

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## Hearing of August 29, 1945.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

United States Court House,
Brooklyn, N. Y.,
August 29, 1945.

Before: HONORABLE MATTHEW T. ABRUZZO, U. S. D. J.

APPEARANCES: 284

KNOWLTON DURHAM, ESQ., Attorney for Plaintiff.

J. READ SMITH, ESQ., Attorney for Defendant.

H. H. GOLDSTEIN, ESQ., and HERMAN ROSENFELD, ESQ., Attorneys for Industrial Union of Marine Shipbuilding Workers of America, and Local 13, an affiliate.

HAROLD CAMMER, ESQ., Attorney for Congress of Industrial Organization.

The Court: What I wanted was this: On April 9th, did you have welders on the job that day who were junior in point of employment to this plaintiff Fishgold and who started to work for your company after the date he started to work? 285

Mr. Smith: No, we did not. We had no junior welders.

The Court: I do not mean junior welders.

Mr. Smith: No welders junior to Fishgold in seniority.

The Court: They had all worked there before he came to work there?

Mr. Smith: That is correct.

The Court: On any of these days, did you have any men working who started to work after Fishgold?

Mr. Smith: On none of the days.

The Court: I am afraid I want your books on that. I want the name of every employee and the date he started to work.

Mr. Smith: I have them available for your Honor in court this morning.

The Court: How many welders did you have on the 9th of April?

Mr. Smith: I would have to check that, your Honor.

The Court: Well, that is the point.

Mr. Smith: I did not know you wanted to know how many we had.

287 The Court: Certainly. If you had 30, how do you know that the 30 of them started to work before Fishgold did unless you can give me the dates of their employment?

Mr. Smith: I can give them to you. We have seniority lists that are issued periodically.

The Court: I do not care about seniority lists. I want to know the date when each man started to work.

Mr. Smith: This list shows the date each man started to work. That is how they are placed on the list.

Mr. Goldstein: Are you prepared to present evidence this morning, Mr. Smith?

Mr. Smith: I am.

The Court: All right. Fishgold, come to the stand. He has been sworn.

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ABRAHAM FISHGOLD, recalled, having been previously sworn, further testified as follows:

*By the Court.*

Q. On the days you reported for work and did not get any work, did you see any welders who were working there who came to work after you originally started with

this company, Sullivan Dry Dock? Do you know what I mean? A. I know what you mean, but it is a complicated answer for me to give you. You see; it works where all the welders come in and they stand around according to seniority rights, which they don't follow in practice.

Q. You are getting into a treatise. That is the trouble. I have gotten too much of that and very little of what I want. I want to know what date you started to work for this company? A. The 21st of December, 1942.

Q. Now, you know what men were there on the 21st of December, 1942; what welders. Is that right? A. Approximately.

Q. About how many were there then, approximately? 290
A. Well, roughly; I would say approximately 100 or 120, or something around there.

Q. You could not tell them all, could you? A. No, I couldn't.

Q. Now, on the days you reported to work there, did you see any men who had been taken on the job, so to speak, after January 1, 1942, or the date you started to work? A. Yes, I have seen several men who started to work after me.

Q. And you saw them there on the days that you did not get work; is that right? A. (No answer.)

Q. You say that there were nine days you were not given work? A. That is right.

Q. Were any of those men who came to work after you started to work in 1942 on the job on those days? Did you 291
see them on the job? A. No, I didn't see them. I mean I have no way of checking that.

Q. Well, you saw which men went in to go to work, didn't you? A. Yes, I have seen which men went in to go to work.

Q. Did you see any of the men who came after you go in to the job on those days? A. No, I did not.

The Court: Mr. Smith, you told me differently on the telephone the other day.

Mr. Smith: Your Honor, I said it could happen on occasion that if Mr. Fishgold did not show up for work a man with less seniority——

The Court: Now, look. I am going to stop being confused in this matter. The answer to my question is a very simple one. How many welders did you have on the job on April 9th?

Mr. Smith: I will check it if you give me five minutes, your Honor.

The Court: Yes. I told you that two days ago.
293 It is a very simple question. I am not going to have any general answer on this; it is too important.

Mr. Smith: Your Honor asked me to be ready to offer proof to show the welders who worked on this particular day and whether or not they had more or less seniority than Mr. Fishgold.

The Court: That is right.

Mr. Smith: And I am ready to prove that. As far as the numbers are concerned, I did not make a list of them, but I can check them from my files in a few minutes.

The Court: Mr. Durham, this is your burden and not mine. You ought to be ready both ways in this case. You have been ready only on one way. You take the broad position that the statute says he is senior to
294 everybody. Suppose I find he is not. Suppose I find he is senior only to the people who came after him. Where is your proof as to this record in that? On an important question like this it is very important counsel have the case prepared both ways.

Mr. Durham: I take the point he is senior to all non-veterans.

The Court: Suppose I do not agree with you. You are out, aren't you?

Mr. Durham: Yes.

The Court: Supposing there were men on the job on those days junior to him. Where is there any proof of that fact? Why weren't you prepared on that point, too?

Mr. Durham: Because I am only interested in this case in proving, in establishing, that the act, Section 8 of the Act, gives him this guarantee of employment over non-veterans.

The Court: All right. Supposing I say you are wrong. You are out, aren't you?

Mr. Durham: Yes.

The Court: Supposing there were men on the job on those days who were junior to him? You might be in, might you not? 296

Mr. Durham: In so far as establishing his right to damages, yes. I would not have any interpretation of the meaning of the act.

The Court: Yes, you would. I might not agree with you, but you would have my interpretation. Now he is going to give me a resumé of the books without you looking at the books. I told him what I wanted. It was said here last week that Mr. Smith—I do not know what Mr. Smith was meant—had the shaping up system in his hands, that he was the one who put the welders to work or not to work. To what Mr. Smith does that refer?

Mr. Smith: I am labor relations counsel for the company, your Honor, and I decide policy regarding shaping up for the company, but the foremen themselves personally work the shape up. 297

The Court: What foreman was on the job these nine days?

Mr. Smith: Mr. Leighton, who is here in court today.

298 *William H. Leighton—By the Court—Direct.*

The Court: All right. Put him on the stand.

Mr. Smith: I have those figures for you, your Honor.

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WILLIAM H. LEIGHTON, recalled, having been previously sworn, further testified as follows:

The Court: Let me have these dates.

Mr. Smith: These are the figures, your Honor (handing papers to the Court).

299 *By the Court.*

Q. Were you the foreman on April 9, 1945? A. Yes, sir.

Q. How many men did you have working as welders on that date? A. It is right on that sheet. That is the accurate count.

Q. From where did you get this sheet? A. From my daily work books, which I have here.

Q. Look at your daily work books, and tell me how many men you had working for you as welders that day. A. On April 9th, your Honor?

Q. Yes.

The Court: What is the date of Fishgold's employment?

300 Mr. Durham: December, 1942.

Mr. Goldstein: December 21, 1942.

A. Approximately 48 men.

Q. Do you know each and every man's name? A. Every one. I have them right here.

Q. Do you know, as to each and every man, what date he first came to work with your company? A. That is right.

Q. Was there any man of that 48 who came to work for you after December 21, 1942? A. No, sir. They all came prior to that date.

Q. All right. I want you to make a list of every man and the date he came to work for you. Now, where did you get the date he came to work for your company for the first time? A. That date comes off our seniority list, which is based mainly on the starting date of the individual.

Q. I am not asking that. Where do you get it from? A. From our personnel department. That sheet is made up and that sheet is passed out to the different departments. 302

The Court: I want that certified.

Mr. Smith: I have it certified and I have the personnel director——

The Court: I do not want the personnel director. I want your books. I want each and every man's name and address and the date he started to work, with either a certification or some man ready to swear to it under oath.

Mr. Smith: I have everything but the address here. I have someone ready to swear to it under oath.

The Court: Have you got it all written out?

Mr. Smith: Yes, your Honor, I have.

The Court: Ready to put it in evidence?

Mr. Smith: I have. 303

The Court: All right, bring that here. This man only knows what is given to him?

Q. Is that right, Mr. Leighton? A. That comes down from the personnel department, the starting dates, yes, sir.

304 *Peter J. Boylan—By the Court—Direct.*

PETER J. BOYLAN, called as a witness by the Court, having been first duly sworn, testified as follows:

*By the Court.*

Q. Have you brought with you a sheet for April 9, 1945, indicating how many welders were on the job that day, with their names and addresses? A. I do not have the names and addresses.

Q. Have you the names? A. I have the names and numbers.

Q. In other words, the numbers and the dates they first started to work with your company? A. Yes, sir.

305 Q. Will you hand me that sheet for April 9th? You had better take them apart, because I want just the sheet for that one day.

Mr. Smith: Your Honor, that list is current all the time. If the list were made up today it would show the same thing regarding any employee's seniority as of April 9th.

Q. Give me the list of April 9th. You have given me 15 or 20 sheets. That is not what I want. I want the one sheet of April 9, 1945.

Mr. Smith: Do you want the welders who were
306 working that day, your Honor?

The Court: He knows what I want.

Q. I want the names of the men who worked on April 9, 1945, together with the dates that they first started to work. Now, that is a very simple question and I want nobody to interfere. A. Your Honor, that would have to be a list made up separately.

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The Court: Mr. Smith, do you want me to put the burden of this suit right on you? Do you want me to give you a decision that the company, who is supposed to have come in here with the information that the Court wants, had not? Do you want me to shift the burden to you?

Mr. Smith: No, your Honor.

Q. I want a certified list or your testimony of the name of every man who was working on April 9th, and the date he started to work for the company. Can you give me that? A. I will have to go back to the office.

Q. All right. I want it here at half past three. I want 308
the names of the men who worked. The last witness said there were 48 welders working that day. I want 48 names, together with the date that each man started to work, and I want you or somebody prepared to swear that that list is correct under oath. A. That is for April 9th?

Q. April 9th, and I will give you the other dates, too. April 9, 1945. Now, the next day he did not work was April 11, 1945.

The Court: Is that right? Correct me, gentlemen, if these dates are wrong.

Q. (Continued) May 17th. These are all 1945. May 18.

The Court: Are these the dates, Mr. Durham, that 309
you claim?

Mr. Durham: Yes, sir.

The Court: Will you call off the dates you claim? May 18th?

Mr. Durham: May 18th.

The Court: May 19th?

Mr. Durham: 19th and 20th.

The Court: May 20th was a Sunday.

Mr. Durham: That was Sunday. That is out. May 21st, 22nd, 23rd and 24th.

Q. Those are the dates I want. Every man who worked on those dates and the dates they started to work for the company. A. Your Honor, can I have those sheets back?

Q. Certainly. Now I want you to tell me, too, if any of these men whose names you give me as working on those dates were steady employees or were they men who worked now and then. Do you understand? A. I understand.

Q. I want you to look at your books and tell me whether they worked right along or whether there was any gap in their days of work. Do you understand that? A. Yes,
311 sir. Do you want all this by half past three?

Q. Yes, sir. It can be done by half past three. A. We have to investigate every man.

Q. That is what I want done.

Mr. Goldstein: Over what period of time is that, your Honor?

The Court: He knows. He knows the difference between a man who works every day and a man who works two or three days and then somebody else works two or three days and somebody else works two or three days.

Mr. Goldstein: That might very well depend, sir, on the period of time over which you measure the
312 regularity of work. It might be in the last six months a man worked regularly and prior to that irregularly.

The Court: I am a little bit stupid. But bear in mind I am the man who writes the decision, and Mr. Smith told me something the other day on the telephone which he is not adhering to today.

Mr. Smith: I have in court today, your Honor, a record showing the names and the dates of employment of every welder in our yard.

The Court: Did you tell me the other day, when I asked you to bring the information to me, that you would be ready to stipulate this morning that there were men working on the dates that Fishgold did not work who were junior to him? Yes or no?

Mr. Smith: Your Honor, I said the records might indicate that. I had not looked up the records.

The Court: Did you tell me you were ready to come here and stipulate to that fact? Yes or no?

Mr. Smith: Your Honor, I cannot recall it.

The Court: You cannot recall what you told me.

Mr. Smith: I recall saying that they might indicate that. If your Honor please, I have this morning— 314

The Court: I am going to tell you something. Before I render a decision in this case, if I do not get the information I want, I am going to make you bring everything you have here, Mr. Smith. So do not try to play fast and loose with me.

Mr. Smith: Your Honor, I am not trying to play fast and loose with you.

The Court: Wait a minute. And if you irk me too much I am going to write you a decision that will put the burden right squarely in your lap and then let you reverse it. Now, I want the thing right. I have been trifled with a little bit here and I do not intend to be trifled with.

Mr. Smith: It was entirely unintentional, your Honor. I have been trying to give you any information you want and I intend to from now on. 315

The Court: I will get it anyhow, even if I have to put my own accountants in here.

Mr. Smith: May I suggest we might avoid this session this afternoon? I have in court here two different records. We have one record which indicates the name of the man, his date of employment and his

number, and we have another record which indicates whether that man worked on the days that Fishgold did not work, and if you examine the two records together you can get the answer you are looking for, but part would have to be taken from Mr. Boylan and part from Mr. Leighton, the foreman. I think I can bring it out for you if you let me do it.

The Court: I am afraid you do not follow me. Supposing you had 48 welders on the 9th. Supposing one man there started to work 15 years ago, and suppose for 10 years he did not work for you and he came back 5 years ago and then for 3 years he did not work
317 for you, and then he came back about 6 months ago, which would be after Mr. Fishgold's employment. Do you think I am going to take your date of 15 years ago and say that is the date of his employment? That is exactly what I told you I wanted, but you did not follow me. I know these men are in and out. I know these men go on longshore duty and welders go with you and they go with another company. But that is not a steady, permanent employment and you are not going to make a man senior to Fishgold because his date was 15 years ago. Do you get my point?

Mr. Smith: I understand now, but I did not understand before.

The Court: You understand it now, don't you? Each man who worked the 9 days that Fishgold did
318 not work, I want to see if he was a permanent, steady employee or whether you are giving me a date of seniority some 10 years back. For 9 years of them he might have been working for Todd Shipyard, for all I know, and, if necessary, I will bring every one of the 48 witnesses here and ask them where they worked all the time. Now, did you want me to go into that?

Mr. Smith: We couldn't tell all that ourselves. I will bring you the actual employment card, the original card which shows when a man comes with the com-

pany and when he leaves and when he comes back, but it does not show daily. If a man is out a week or two here and there it would not show that. In fact, I have the records here of how many men worked, how they were shaped and what days they worked.

The Court: Give me the record of each man who worked for the nine days Fishgoid did not work. I want you to show me whether he had steady employment or spasmodic employment.

Mr. Smith: I can show you the card. Whether it was steady or spasmodic will have to be determined by your Honor. So I do not misunderstand you again, you want the original employment card which shows when he was employed and whether he left our employment and came back. 320

The Court: Yes.

Mr. Smith: You also want our record which indicates the actual men who worked on those particular days.

The Court: Those nine days. That is right.

Mr. Smith: Other than the original cards, I have all of the records here.

The Court: Well, you bring them here.

Mr. Goldstein: May we ask your Honor's indulgence on that half past three? I came rushing in——

The Court: No. This does not concern you.

Mr. Goldstein: It concerns us very fundamentally.

The Court: And if you are not here it does not hurt you, except you can cross-examine on it. I am going to take it at half past three. 321

Mr. Goldstein: We all have to be here again tomorrow.

The Court: I may want something else tomorrow. Off the record.

(There was discussion off the record.)

The Court: Half past three.

(A recess was taken until 3:30 P. M.)

(In Chambers)
United States Court House,
Brooklyn, New York,
3:30 P. M., August 29, 1945.

(Met pursuant to recess.)
(Appearances as heretofore noted.)

PETER J. BOYLAN, recalled, having been previously sworn, further testified as follows:

*By the Court.*

323 Q. Have you got the records for the 9th of April? A. We have all the records and we have them segregated on different lists.

Q. For what days have you got the sheets? Give them to me one at a time. A. They are all the days, and here are all the records here.

Q. April 9th you have from numbers 1065 to 1106, and then there are other numbers in here, a total of 46 men: is that right? A. That is right.

Q. You said 48 this morning. A. I think he said approximately 48.

The Court: Did you say 48?

Mr. Leighton: I said approximately 48. I counted
324 them roughly in the book. There may be a repeat of a few.

The Court: On your book you have 48?

Mr. Leighton: No. I said approximately 48.

The Court: Well, count them in your book.

Mr. Smith: That was supposed to be taken from his book. That is where he got that list.

The Witness: 46.

Q. Now, you have got the records for April 10th, May 17th, 18th, 19th, 21st, 22nd, 23rd and 24th: is that right? A. That is true.

Q. Now give me the cards for April 9th, at the moment. A. Well, your Honor, these cards, where you see a bunch of men here, they will also be duplicated here.

Q. Each man has a number, hasn't he? A. That is right.

Q. And you have given me the numbers and the dates; is that right? For April 9th you have given me 46 different men who have numbers from 1065 up; is that right? A. That is right.

Q. You have done the same thing for the 10th; is that 326
right? A. That is true.

Q. The bunch of cards you have in your hand, do they cover every number for those nine days? A. Every number, yes, sir.

The Court: Mark those in evidence.

(Cards received in evidence and marked Court Exhibit E.)

Q. What was Fishgold's number?

Mr. Smith: If your Honor please, if they are going to be kept for any particular time, may we have the right to substitute photostatic copies?

The Court: I will keep them only one day. 327

Mr. Leighton: 1804.

Q. Fishgold's number is 1804; is that right? A. That is right.

Q. Does each man get a number as he comes in? A. As he is hired he is assigned a number.

Q. And you do that in chronological order? A. That is true.

Q. So that if a man has a number 1803, he would be one senior to Fishgold; is that right? A. No; it would not work out that way, your Honor. If we had a man who worked on 1803 prior to him and he left our employ and that number was open, we would assign it to a new man.

Q. Is it fair to say that any number after 1804 would be an employee who came after Fishgold? A. No. He may come before Fishgold. They are all mixed up. For instance, 1805 may have started before Fishgold.

Q. I am taking the first one, 1065. He left on July 31, 1945, for the service; is that right? A. That is right.

Q. Now, the date on the left here, 5/20/41— A. That is the day he started.

Q. That is the day he first started with your company; is that right? A. That is right.

Q. Up to the time he left in 1945, the card does not show how many days he worked, or how often he worked, or how steadily he worked? A. No, but this is an indication here. May I just turn this over? On this card we list all our vacations. If a man received a vacation each year you can rest assured he worked pretty steady. He had to have a required number of hours to receive a vacation.

Q. In other words, where there is a vacation card, that man has worked fairly steadily during the year that he is given a vacation. I see you have got 40 hours in 1942. A. That is what they are paid, 40 hours.

Q. And here 48 hours. A. We increased the vacation. You will only see that in a set up like this, where a man left our employ, but we won't have the rate card attached for a man still in our employ.

Q. Now, take the next one, 1133. 1133 is James J. O'Connell. He started on 4/18/41; is that right? A. Yes, sir.

Q. Then you have 6 23 41. What does that second date mean. A. Increase.

Q. That is when he got his increase? A. The increases as you go along and when he got them.

The Court: The plaintiff's date of employ was December 21, 1942?

Mr. Goldstein: That is right.

Q. Now, this card does not show how steadily he worked, does it? A. That man is one of our old employees. He is still in our employ.

Q. That may be, but the card itself does not show how steadily or unsteadily he worked. A. If he lost any amount of time, especially more than 90 days, it would be marked on there and then he would be considered a new employee, but from time to time men are sick and ask for a leave of absence, and those things are not kept record of.

Q. I just want to get the form. Did your company employ any new welders after this man left? A. Do you mean the day he was shaped up?

Q. No. Did any welders come for the first time to work for your company after Fishgold on December 21, 1942? He came to work for you that date? A. Yes. Did we employ any welders?

Q. After that date. A. Oh, yes; hundreds of them since December 21, 1942.

The Court: Have you a payroll sheet for those nine days to show whom you paid?

Mr. Smith: We have a payroll record. We have a thick book. We had as high as 3,000 employees.

WILLIAM H. LEIGHTON, recalled, having been previously sworn, further testified as follows:

*By the Court.*

Q. For each one of these days, your book contains numbers of the men who worked? A. Yes, and what job they worked on.

Q. These are just welders; is that right? A. That is right.

Mr. Goldstein: May I suggest we note on the record Mr. Leighton is now testifying?

The Court: Yes, Mr. Leighton is now testifying.

Q. Where does April 9th start? A. Right here (indicating).

Q. What does this mean, "Pike 1031"? A. That is the name of the boat and that 1031 means he was used as a snapper on this job.

Q. Then you have others than welders in this book? A. He is a snapper.

Q. Snapper and welder? A. He does not do the same duty. The welder does the job and the snapper is responsible for that job.

Q. He is the boss on that particular job? A. Yes.

Q. In other words, 1031 is the snapper? A. That is right.

Q. And the other numbers of the welders? A. The welders who worked.

Q. Who worked on that day? A. That is right. Like on that particular day on this sheet here there are five snappers. They are not on the list, but they are in the book; five different snappers.

The Court: Have you gone through these records, Mr. Durham?

Mr. Durham: I went over to the yard and looked at the cards.

The Court: Let this book be marked in evidence.

(Book received in evidence and marked Court Exhibit F.)

The Witness: This one here is a continuation which covers those dates in May.

The Court: Mark both of them.

(Book received in evidence and marked Court Exhibit G.)

Q. Look at this typewritten sheet. You have "Pike 1031". A. 1031 is the snapper. 338

Q. You have that number in your book, haven't you? A. Yes.

Q. Is that one of the 46 that you counted? A. No. These 46 are the actual welders.

Q. I am not concerned with that. Is Pike a welder; yes or no? A. Pike is the name of the boat and 1031 is the snapper who bosses those men and his number is not on that sheet.

Q. The number is not on this sheet, although he is a welder or a boss welder? A. He is a boss welder, but he does not perform the duties of a welder.

Q. Is every number on this April 9th sheet one of the 46? A. Yes.

Q. Or have you more than 46 numbers there? A. There are more than 46 numbers, but those are the snappers. 339

Q. How many snappers did you have on that day? A. We had five on that day.

Q. And they are boss welders? A. That is right.

Q. And their numbers do not appear on this April 9th sheet? A. No, their numbers do not appear on the sheet as a welder.

340 Q. Pick out the other four. A. 1195, 1031; Fletcher, 1120; Worth, 1125 and 1000.

Q. Do you know when they came to work with you? A. Definitely.

Q. What date they came to work? A. We have those cards right here. On a different date some of these men had to go back as a welder, and all these men who are snappers on these different dates; if they don't appear on here as a snapper, their cards are still in there to cover their starting time.

341

PETER J. BOYLAN, recalled, having been previously sworn, further testified as follows:

*By the Court.*

Q. Now, Mr. Witness, from what did you take this typewritten record? A. This record was made up from the lists submitted to me by the foreman who checked in the man who worked on that day, aside from the boss welders or snappers here as just mentioned.

Q. Is there any book that showed what welders were paid on April 9th, the number of welders who were paid, and how many? The payroll book would show, wouldn't
342 it? A. The payroll will show that, yes, but that is quite large.

Q. It is a large book. I know that. But doesn't it show just what welders were paid and how much each one was paid? A. It does. It shows the hours they worked on each day, but then we total the hours at the end of the week, so much per hour and so many hours, and give him a total.

Q. When did you make up this typewritten sheet? A. This afternoon, at your request.

Q. Did you make it from these cards? What did you make this typewritten record from? From what record did you take it? You did not draw it from memory, did you? A. No, sir.

Q. From what book did you take it? A. From the lists submitted to me by the foreman, Mr. Leighton, which he obtained from his book record, which is the actual record of the men who worked on those days in question.

Q. That is, these books in evidence now; is that right? A. That is true.

The Court: Are there any other questions you want to ask? 344

Mr. Goldstein: May I suggest you identify the typewritten sheets for the record?

The Court: The exhibit numbers show that.

The Clerk: Exhibit H.

Mr. Goldstein: The sheet is H and the two books are F and G, respectively.

The Clerk: That is right.

(Typewritten sheets received in evidence and marked Court Exhibit H.)

The Court: I want to call your attention to the fact that, just looking at these cards superficially, without doing much more than that, I find that there are three names on the book which the foreman gave me, Worth, Fletcher and Pike, for whom there were no cards presented. 345

Mr. Leighton: They are ships, your Honor.

The Court: The numbers are not on these cards, either.

Mr. Goldstein: If your Honor please, may I cross-examine the witness on this matter?

The Court: Yes, you can cross-examine if you want to.

Mr. Goldstein: Or may I cross-examine Mr. Leighton? I think that would be the best way to establish it.

The Court: Get through with Mr. Boylan first.

Mr. Goldstein: I have no questions to ask Mr. Boylan.

The Court: Colonel, have you any questions?

Mr. Durham: Yes.

*Cross-examination by Mr. Durham.*

Q. Mr. Boylan, am I correct in my understanding that
347 the cards which you have produced are the cards of all the welders who worked at the defendant's plant on these nine days when Fishgold, the plaintiff, was shaped up? A. That is true.

Q. That is correct? A. That is right.

Q. Do you know whether any of those men were veterans who had been discharged from the Armed Service and had been restored to work? A. Any of these men mentioned on the cards?

Q. Yes. A. I did not scrutinize the record that closely, but if they were, it would be marked on the card if they were a returned veteran.

Q. Could you tell me that? A. I would have to go through all the cards and see.

Q. Will you do that before we adjourn today? A. As
348 soon as his Honor will let me have the cards, I will look the cards over. We marked every card as a man returns to work as a veteran. He has to submit to us his discharge papers.

Q. I would like to have that in the record.

The Court: I can tell you this: The cards show the man went into the service. They do not indicate

whether he came back from the service or not, as far as I can see.

Mr. Durham: As I understand the witness, if they do not show that, then he is not a veteran.

*By the Court.*

Q. Is that what you mean? If the card does not indicate he came back as a veteran, then you would say he was not a veteran? A. I would say he is not a veteran, from memory. Now, it may be——

Q. There may be a mistake in a few? A. He may have gone into the service in the early part of 1942 and came 350
back to us as a new employee. I don't know that. He might have been in the service and discharged, say in October of 1942, and that is prior to Fishgold's employment with us. He may have been a veteran for those number of months—we don't know that—but he came to us as a new employee and we put him on as a welder.

*By Mr. Durham.*

Q. That could be, but it would not be very likely, would it? A. It has happened. We have some men down there like that. Who they are I cannot tell. But definitely, if a man was in our employ and left our employ to go into the armed service and came back to us like Fishgold did, the card would be so marked. 351

Q. Will you look at the cards before we adjourn today and later on just tell us? A. I will, yes, sir.

Q. Whether any of those men are discharged veterans. A. Yes.

Mr. Durham: That is all, your Honor.

Mr. Goldstein: May I recall Mr. Leighton?

The Court: Yes.

WILLIAM H. LEIGHTON, recalled, having been previously sworn, was further examined as follows:

*Cross-examination by Mr. Goldstein.*

Q. Mr. Leighton, I show you this stenographer's note book which has been marked in evidence as Court's Exhibit F. I have turned to the page which, at the top of it, has a notation "April 9." I take it that refers to April 9, 1945? A. That is right.

Q. Now you have, as the first entry in the left-hand column, the word "Plate". What is that? A. That is the position of the job. In other words, that is the plate shop.
353 In other words, where all these welders are working.

Q. Alongside of the word "Plate" you have a number, 1195. What does that mean? A. That is the number of the snapper who has charge.

Q. On the very next line you have a series of numbers, beginning with 1065, and 1133, and so forth. What are those numbers? A. Those are the welders' numbers.

Q. Who were actually at work? A. Who actually did the job; that is right.

Q. Two lines before the line on which appears the word "Plate" and the number "1195", there is a number "1875", which has a penciled oblong drawn around it. What does that indicate? A. That indicates that he started a job at the plate shop.

354 Q. That is, 1875 started a job? A. He started at the plate shop and that little notation there, that square——

Q. The "9:30" above what you call a square and what I call an oblong shows the time of day at which what happened? A. That man there was put on another job.

Q. At 9:30 A. M.? A. Approximately 9:30.

Q. In the right-hand column, on the first line under the date, you have the word "Pike". What does that mean? A. That is the name of a ship.

Q. On which work was being done? A. That is right.

Q. Alongside of that word "Pike" you have the number "9031". What is that? A. That is the snapper.

Q. Who had charge of the welders upon that vessel? A. That is right.

Q. On the very next line you again have a number which is blocked off in a penciled oblong, with "9:30" just above the oblong. Does that mean the same thing as was meant in the left-hand column? A. All those squares or oblongs, mean the man has changed the job during the day.

Q. And wherever you have such a square or oblong on the page—. A. He has changed the job the same day.

Q. On the line just below the line which carries the name "Pike" you have a series of numbers, and so do you have on the next line and on the next line. What are those numbers? A. Those are the numbers of the welders who welded on that job. 356

Q. By "that job", you mean on the Pike? A. On the Pike.

Q. The next line after that series of numbers contains the word "Fletcher" and, alongside of it, the number "1120". Will you explain what that means? A. The Fletcher is the name of a boat and "1120" is the snapper on the boat.

Q. And underneath that the numbers that appear in the following two lines are the numbers of the welders who worked on the Fletcher? A. That is right. 357

Q. On that day? A. On that day.

Q. Below that you have a line which starts with the word "Worth" and then has two numbers alongside of that word, "1125" and "1000". What does all that mean? A. The Worth is the name of the boat and the "1125" and "1000" are the snappers on the boat.

Q. Let me ask you this: Wherever you have the name of a vessel and a number or numbers alongside of it, does that mean that the men whose number or numbers those

are are snappers? A. The majority of times, yes. I would say 99 percent of the time.

Q. Sometimes it might be a worker? A. It might be, but the chances are it is not.

Q. Do you ever write down the names of the men on these pages or only their numbers? A. Only their numbers.

Q. So that where you have a name, as, for example on the sheet headed "April 99", such as Card, McKay, Gloria Godkin, that is the name of a vessel? A. That is right, or the names of the boats.

Q. Is what you have just explained as your method of making entries true for all the other dates? A. That is right.

Q. For example, April 10th, April 11th and April 12th? A. Yes.

Mr. Goldstein: I have no further questions.

The Court: Any further questions, gentlemen? I have a few when you get through.

Mr. Goldstein: Not at this moment from me.

Mr. Durham: May Mr. Boylan answer the question which was interrupted now?

The Court: Yes. Well, if you wait until I get through with him. I have one question to ask this witness.

*By the Court.*

Q. Look at this card. This is a card of a man whose number is 1116, Andersen, Gustav Adolph, and you have him starting to work on 9/15/42. A. I have nothing to do with these cards. These are personnel records.

The Court: All right. I am through with you, then.

PETER J. BOYLAN, recalled, having been previously sworn, further testified as follows:

*By the Court.*

Q. Is that right? He worked on April 11th, didn't he? A. That is right.

Q. You have got him down there as a second class welder, haven't you? A. That is what he started in as, yes.

Q. That is what the card shows, isn't it? It shows he started as a tacker? A. No. $1.14 rates as a second class welder. $1.20 rates as a first class welder.

Q. That is in ink, isn't it? A. Yes, and that is written in ink, too (indicating). 362

Q. But he started as a second class welder; is that right? A. So did Mr. Fishgold start as a tacker.

Q. Now, you know you would be much better off if you would just answer my questions.

Mr. Smith: Answer the Judge's questions.

Q. He started as a second class welder; is that right? A. That is right.

Q. And, as far as the card is concerned, where I am reading to you "Welder; position, second class," that never was changed, was it? Look at it. A. Well, they put a "1" through there.

Q. The typewritten part was never changed, was it? A. 363
No. The pencil mark is marked through the "2".

Q. The pencil mark is through the "2" which I know nothing about. All I can tell you is what the typewritten record shows, is that right? A. That is right.

Q. Now, here is the record of a man by the name of Horsh, 1862. A. Right.

Q. The record shows he started as a tacker? A. That is right.

Q. And then he is a welder; is that right? A. That is right.

Q. What kind of a welder? A. $1.20 an hour. This is what we go by. That is the first class rate and he got his raises according to those dates.

Q. The first record you have of anything showing he is a first class welder is 12/14/42; is that right? A. That is right.

Q. December 14, 1942. A. That is the date he got the $1.20 rate. That is correct.

Q. Before that he got the $1.14 rate? A. Which is the second class welder's rate.

Q. In other words, before that date he was a second class welder; is that right? A. Correct.

Q. On December 21, 1942, this man was a first class welder, wasn't he; Fishgold? A. No, sir.

Q. Wasn't he? A. No, sir.

Mr. Smith: I have the employment card here, your Honor.

Q. What was he? A. He came in as a tacker, a beginner.

Q. And that is a welder, isn't it? A. A tack welder.

Q. Do you make a distinction in classification in addition to seniority? You give him seniority as a tacker, seniority as a second class welder and seniority as a first class welder? A. Well, that goes according to their grade. They are upgraded as they go on.

Q. Do you give seniority in each grade? A. Yes, sir, we do.

Q. In other words, in determining the seniority of these men whose cards you presented here, you have gone according to the seniority in each grade as they go along; is that right? A. We have to go according to the seniority and the date the man started.

Q. Don't you understand what I mean? If he starts as a tacker he gets a seniority as a tacker, is that right, although he is practically a welder? Is that right? A. Yes.

Q. And then, if he is made a second class welder, there is a seniority there, too; is that right? A. That is right.

Q. And then, if he is made a first class welder, there is a seniority there, too; is that right? A. That is right.

Q. So that in shaping men up, if a man became a second class welder, we will say, before a man came to work with you as a first class welder, the man who came to you as a first class welder later than he was a first class welder, although he was a second class welder during that time, that man would be senior to him in first class, wouldn't he? A. That is true.

Q. And so some of these cards show; is that right? A. They show according to the day they start.

Q. There are quite a few tackers and welders, second class and first class, on these cards with the dates they arrived at them; is that right? A. That is right.

Q. I am asking you what the principle behind this seniority is. Do you have seniority of a tacker and a second class welder and first class welder?

Mr. Goldstein: If your Honor please——

The Court: Let him answer now.

Mr. Goldstein: I would like to raise an objection. I do not think it is competent evidence.

Mr. Smith: May I object to the competency of the witness regarding this? The policy regarding seniority is set by the Labor Relations Council.

The Court: I am asking what these cards show. All right; we will take just the one.

Q. The first time that Horsh became a first class welder shows on this card, 12/14/42; is that right? A. That is correct.

370 *Peter J. Boylan—By the Court—Direct.*

Q. At that time Fishgold was a second class welder? A. He was a tacker, at 82 cents an hour.

Q. A tacker is the lowest form of welder? A. That is a beginner.

Q. According to this record, this considers Horsh senior to him; is that right? A. That is correct.

Q. So I am right in saying that your system is that each man gets a seniority in whatever class he is in? A. It really bases from the date of start.

Mr. Smith: I renew my objection, your Honor. This witness is not competent to testify.

371 The Court: If he is not competent, he can very easily say he does not know.

Mr. Goldstein: I have a different ground of objection, and that is that we are asking a witness to explain to us the effect of a legal document that establishes the mode of calculating seniority and the basis of seniority. That document is the collective bargaining agreement between the parties.

The Court: Let me disabuse your mind. I am going to tell you tomorrow the collective bargaining agreement you have with this company is of no avail to me in this case. I am making that ruling for you.

Mr. Goldstein: You may say so, but we are entitled to place on the record our position with respect to that.

372 The Court: You can place that on the record by your answer.

Q. Now, do you know whether seniority goes according to the different ratings the men have? A. It goes according to his date of start and, if he comes in as a beginner like this man did, every three months we have a set-up that he gets a raise if he qualifies.

Q. Assuming a man became a first class welder before Fishgold did. He is senior to Fishgold, isn't he? A. If he started before Fishgold, yes.

Q. Then what determines seniority? The date he starts to work or the date he becomes a first class welder? A. After all, if Mr. Fishgold started in December of 1942 as a tacker and we had a man came in after him in December, 1942, as a first class welder, in the case of a shape up or lay off, we would keep the first class welder prior to the tacker.

Q. That is right, and that is the way you determine seniority; is that right? A. That is for the Union to answer that. 374

Q. Is that the way the Sullivan Shipyard does it? If you don't know, say so.

Mr. Smith: I renew my objection and I would like a ruling on it.

The Court: I have overruled your objection. He has just answered it before by saying he would keep the first class welder.

Mr. Goldstein: I take it, your Honor, this line of examination, without my troubling you with interruptions, is subject to my objection and my exception.

The Court: Yes. You have raised the question squarely by your answer. You do not have to worry about that.

Mr. Goldstein: I did want my objection noted as 375 continuing.

The Court: All right. That is all I want. I will go through these cards.

Mr. Goldstein: May I ask some questions on the cards?

376 *Peter J. Boylan—By the Court—Direct.*

*By the Court.*

Q. Do you pay any attention, in shaping up these men, to what you term their ability? A. That is up to the foreman of the department, sir.

Q. Does he pay any attention, do you know? A. Absolutely. That is his job. That is what he is there for.

Q. He pays attention to the fact and, if one man has more ability than the other, he utilizes that in shaping them up, does he? A. Still the seniority phase comes into it.

Q. Seniority is part of it and ability is part of it; is that
377 right? A. That is right.

The Court: Now I have all I want. I will give you back these records.

Mr. Durham: Now may I ask Mr. Boylan to answer my previous question?

The Court: Yes.

*By Mr. Durham.*

Q. Mr. Boylan, do you remember my question? A. I looked the cards over and I do not see any there which were marked as men who were formerly in the service and discharged from the service.

Q. Men who had completed military service and returned
378 to work? A. Those cards are not so marked.

*By the Court.*

Q. As far as the cards are concerned, in your perusal of them you can say the cards do not show any of them are war veterans; is that right? A. That is true.

*By Mr. Durham.*

Q. If they were war veterans, you said the custom or the practice was to enter that on the card, didn't you? A. Yes. If they were former employees who left our service to go into the service, when they came back their discharge papers had to be shown to us and that is marked on the cards.

Mr. Smith: May I ask some questions, your Honor?
The Court: Yes.

*By the Court.* 380

Q. Under the Selective Service Act, subdivision (c) provides that when a man is restored to his job without loss of seniority he shall be entitled to participate in insurance and other benefits offered by the employer pursuant to established rules and practices, and so forth. Now, has each man in your plant got an insurance of some kind? A. I don't know.

Q. You haven't any insurance where the company pays a part? A. No.

Q. Have you any other benefits they subscribe to? A. No, sir.

Q. Pension benefits? A. No, sir.

Q. Of course, they have social security benefits? A. That is all. 381

Q. Of course, if they do not work during the year, they lose the benefit of that social security in so far as your plant is concerned; is that right? A. Yes.

Q. You contribute to each employee's social security and he contributed to it? A. That is correct.

Q. So for the time he does not work he loses that social security, doesn't he? A. That is correct.

Q. You haven't any other benefits outside of the seniority and of social security. Am I right in assuming that? A. Yes.

Mr. Smith: May I ask a few questions?

The Court: Yes. You can ask any questions you wish.

*By Mr. Smith.*

Q. Mr. Boylan, I show you a personal record of Antonio Zappia, No. 1182, and I note in the upper line, over the word "Position", you have the word "Tacker". Is that correct? A. That is correct.

383 Q. What does that indicate to you? A. That indicates a beginner welder. When he first came to our employ he was employed as a tacker.

Q. Does that mean he always remains a tacker? A. No.

Q. I show you the reverse side of that card, and I see the date 7/7/41. After that, the rate, 50 cents. Will you indicate, or explain to the Court, the meaning of those words? A. 7/7/41 was the date of his hire and he was hired at the rate of 50 cents an hour, which we were paying a tacker at that time.

Q. Under that I see the numbers "9/24/41", and under the column "Rate", "75 cents". Would you indicate what that means? A. That means the raise. He got a raise after two and one-half months.

384 Q. Where would it indicate after two and one-half months? A. "9/24/41." That is the date he got the raise.

Q. After that I see "1/7/42", and under the word "Rate" I see ".92". Will you indicate what that means? A. That means that he got another raise to 92 cents on January 7, 1942.

Q. And under that "4/1/42" under the word "Date", and "1.12" under the word "Rate". A. On April 1, 1942, he was raised to $1.12 per hour.

Q. Next to that, "6/23/42" under the word "Date", and under the word "Rate" I see "1.20". Will you indicate what that means? A. It means he was raised to $1.20 on June 23, 1942, which is the first class rate.

Q. And these other rates between 50 cents per hour and $1.20 per hour are different classifications as he goes up the line; is that correct? A. That is true.

Q. On April 9, 1945, April 11, May 17, May 18, May 19, May 21, May 22, May 23 and May 24, 1945, were all the welders who worked on those dates first class men? A. Yes, they were:

Q. Was Mr. Fishgold a first class man in those days? A. Yes, he was. 386

Mr. Smith: That is all.

The Court: Have you got Fishgold's record here?

Mr. Smith: If you want to put it in, your Honor, you may put it in as a Court's exhibit or plaintiff's exhibit.

The Court: You can put it in as my exhibit.

(Employment record of plaintiff received in evidence and marked Court Exhibit 1.)

*By Mr. Goldstein.*

Q. Mr. Boylan, addressing myself further to this card that Mr. Smith examined you about a moment ago, namely, the card of Mr. Antonio Zappia, on the same side of the card as appears a record of those rates of pay and the dates at which each rate was assigned, respectively, to Mr. Zappia, there is at the very bottom of the card Mr. Zappia's name, Mr. Zappia's number, and then, in typewriting under the caption, "Position", the word "Tacker". Does that indicate Mr. Zappia's current classification, or classification some time after he was hired, or the classification that was

given on the day of his hire? A. That is the classification he was given on the date of his hire.

Q. And that would be true for all of your cards, that the word under the caption "Position", at the very bottom of the face of the card on which are contained the words "Personnel record, Sullivan Dry Dock & Repair Corporation", is the classification at the day of hire? A. That is right.

Q. That is true of all cards? A. That is true.

Q. Now, your $1.20 rate is presently, as Mr. Smith elicited from you, the first class welder's rate? A. That is right.

Q. The $1.12 rate is what rate? A. That was the first class rate on that date.

Q. By "on that date", you mean back in April, 1942? A. That is right.

Q. On June 23, 1942, what happened to the first class welder's rate? A. The first class welder's rate went from $1.12 to $1.20 an hour.

Q. That was under the Shipbuilding Stabilization program that a flat 8 cents an hour increase was given to all your employees? A. To all our employees.

Q. So that at the present time your first class rate is $1.20? A. Yes.

Q. Your second class welder's rate is $1.14? A. Yes.

Q. The third class welder's rate is what? A. $1.

Q. Do you have any tack welder's rate underneath the $1 rate at the present day? A. 88 cents is the tacker's rate now. The starting rate was 82 cents an hour.

Q. Prior to June 23, 1942, each of those rates I have just mentioned was 8 cents per hour lower; is that right? A. That sounds correct; yes.

Mr. Goldstein: I have no further questions on this. I will, with your Honor's permission, request that, of those records of which you may make use in your

findings, photostat copies be placed into the record so that if we must have recourse, any party, to an appellate court, we will have a complete record of those exhibits.

The Court: Oh, yes. You can do that afterwards.

Mr. Goldstein: Thank you very much.

The Court: I have one point I want to check up here.

Mr. Goldstein: While you are doing that, perhaps I can conserve some time by reading into the record some pertinent sections of the seniority sections of the two contracts.

The Court: Yes. They are in your pleadings. 392

(Mr. Goldstein conferred with Mr. Smith.)

Mr. Goldstein: Out of the contract dated May 17, 1944, I would like to read from the article on seniority, which is numbered IV, those sections which Mr. Smith did not place in evidence, namely, Section 1, which reads as follows:

"The following departments shall be recognized in the yard: Hull, welding, pipe-fitting, rigging, burning, inside machinists, outside machinists, blacksmiths, carpenters, joiners, wood caulkers, laborers and fire watchers.

"Section 2. The company shall prepare and post for each such department a list showing the length of service of each employee according to his trade classification within the department. Such lists shall be 393 arranged in order of length of service and copies shall be furnished to the union.

"Any employee may protest in writing his length of service as posted by the plant, provided he does so within two weeks after his name is posted in the list. Such protest shall be handled as any other grievance.

"Section 3. Employees shall lose all seniority rights if (a) they terminate their service voluntarily when

394 *Peter J. Boylan—By the Court—Direct.*
*Motion to Dismiss.*

needed, (b) they are discharged for proper and sufficient cause, (c) they do not report for work when notified, unless within three days they present a reasonable excuse, (d) they do not work for the plant for three months (consecutively), unless absence is due to illness or injury (as evidence by a proper medical certificate), or unless leave of absence has been granted."

*By the Court.*

Q. Here is a card for Max Follander. Will you look at that? A. Yes, sir.

395 Q. He was discharged, the card shows, from the army 4 26/37; is that right? A. That is correct.

Q. You do not consider him a war veteran? That was before the war; is that right? A. That was before the war.

The Court: All right. That is all.

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Mr. Smith: If your Honor please, I would like to renew my motion at the close of the case at the prior hearings.

The Court: Yes. What are the grounds of your mo-
396 tion? I would like to have the grounds of your motion specifically.

Mr. Smith: At this time I renew my motion to dismiss the plaintiff's case on the ground they have failed to prove a prima facie case under the act.

The Court: Where is the burden under the act, in your opinion? How much of the burden devolves upon the plaintiff here? How much has he got to go forward in order to show a prima facie case, keeping in mind what the act

says and, too, that anything he might prove in order to show his seniority is of disadvantage to him because it is all in your possession and not his? Is that right? He could not know to whom he is senior or junior, because of the fact that there might be a couple of hundred welders there and you would be the only one who would know that. And, of course, if to prove a prima facie case he has to prove every step of the way, do you think that was the burden the Selective Service Act intended to cast upon him? I have in mind that "burden of proof" is a peculiar term. Sometimes it does shift from the plaintiff to the defendant. Now, in this particular case why wouldn't he have a prima facie case when he shows he is a war veteran, that he has asked for his job within the 90 days and that you refused to put him back? Don't you have to show justification for refusing to put him back?

Mr. Smith: If we had refused to put him back, I think he would have established his case.

The Court: I am going to hold that a layoff from day to day is a discharge. I am going to hold he is a permanent employee. That you wanted a ruling on. I am going to rule that a layoff from day to day is not what is contemplated by the act, and I am going to tell you why. If a guarantee for a year means anything, it means exactly what it says. If you could put him to work one day and lay him off three, and put him to work another day and lay him off two, at the end of a whole year he might only have 30 or 40 days' employment and 300 days out of employment. Would you then say you were adhering to the spirit of the rule?

Mr. Smith: Well, that was his job before he went into the service. The same circumstances existed at that time. The same thing could have happened.

The Court: But what you forget is that Congress guaranteed him a year's work. Now, it either meant what it said or it did not mean anything. It either meant that once

you took him back you had to hold him a year or it did not mean anything. If it means you took him back and the guarantee goes according to the custom and the mode of work he did before, why didn't Congress say so?

Mr. Smith: It is for your Honor to decide what Congress did say.

The Court: I am just trying to be logical about this. If you could lay him off at will, we will say, do you think you would be complying with the statute?

Mr. Smith: Well, we did not lay him off at will. We laid him off of necessity.

The Court: No, because you had other men working those days. Now, if you had no men working those days your defense might be a complete one.

Mr. Smith: Before he went into the army he was laid off because of necessity.

The Court: I have been thinking about this ever since you tried the case and, while I gave you this idea today, I am not sold on that idea. Did Congress really intend to guarantee these fellows a job back provided you had a job?

Mr. Smith: My personal opinion of the act is that Congress wished him to get the same job that he had before, under the same conditions as he had before, no more and no less.

The Court: And leave it to you to decide whether he is senior or not? I do not think they meant quite that.

Mr. Smith: That was decided before he went into the army. That was decided by the War Labor Board.

The Court: They were very gracious to all these boys before they took them and that was a kind of promise they made to them. I am just trying to think out loud.

Mr. Smith: The War Labor Board decided those conditions, your Honor.

The Court: The War Labor Board has made a lot of decisions I am not interested in. There is no appeal from a Labor Board decision and there is here; this is the

place he ought to be, because if you are wrong, or I am wrong, he can have it reviewed.

Mr. Smith: And if the company is wrong, they take the company's plant away from them.

The Court: Yes. I am bothered by the Selective Service Rule 198.

Mr. Smith: And I don't think you are bound by the War Labor Board.

The Court: I know the argument my friend is going to make: seniority. They have men who were working there for 20 years. That is true. But didn't Congress have in mind that if these boys did not go over to war that fellow with the 20 years' job would not have any job? He 404
would be out of a job anyway, because if Mr. Hitler came over here nobody would have had a job. I would not have had one, either.

Mr. Smith: That is a rhetorical question and I suggest you refer that to Mr. Goldstein.

Mr. Goldstein: Since we are thinking aloud, if your Honor please——

The Court: Let him finish his motion. Suppose you make your full motion and I will rule on it. I am inclined to think the burden is on you; first, all the requirements of the statute, and then, if he has not got seniority, you have the burden on that, because you are the only one who has the evidence and he has not.

Mr. Smith: He has access to our records at any time 405
on seniority.

The Court: How has he? What law gives it to him?

Mr. Smith: He can protest his position on the seniority list.

The Court: I mean in this Court.

Mr. Smith: As far as this Court is concerned, I do not know of any law.

The Court: There is no law in this Court that permits him before he starts his action to examine your books. Am I right on that?

Mr. Smith: He has a contract which is sacred in this Court, and under that contract he has the right to examine.

The Court: In this suit under the Selective Service Act there is no rule and no way that he could examine your books before he started his action. Is that right?

Mr. Smith: There is no provision for it that I know of.

The Court: And if you moved to dismiss his complaint before you filed an answer, because it states facts insufficient to sustain the complaint, he would be in hot water, wouldn't he?

Mr. Smith: Undoubtedly.

The Court: And if it was dismissed he would be without redress, and he would be without redress because he
407 could never get the only evidence which might help him.

Mr. Smith: I think on an examination before trial he could get it.

The Court: He cannot get an examination before trial until you answer.

Mr. Smith: That is correct.

The Court: But before you answer you make a motion to dismiss his complaint and out it goes; he is through.

Mr. Smith: I think he could get an inspection on the motion.

The Court: On what motion?

Mr. Smith: On the motion to dismiss.

The Court: There is no rule which says that. You have to answer.

408 Mr. Smith: The right of inspection on the motion. I think the Court can grant him that.

The Court: Well, that is to be seen. I am just thinking out loud. All right; if you have any other part to your motion, you had better make it.

Mr. Smith: I move to dismiss the plaintiff's case on the ground they have failed to prove a prima facie case under the act, and that the evidence fails to establish a violation by the defendant of the act in question.

The Court: That is denied.

Mr. Smith: Exception.

Mr. Goldstein: I would like to make a motion if your Honor please; first, a motion to strike such portions of Mr. Boylan's testimony as I objected to and as were subject to my continuing objection.

The Court: You want to strike out all the testimony you objected to?

Mr. Goldstein: Yes.

The Court: I refuse to do that, because you have an exception which protects you anyway.

Mr. Goldstein: The second motion I would like to make is again for dismissal of the complaint on the ground that 410
neither the complaint nor the testimony and evidence adduced in support thereof show a cause of action on either of the two counts pleaded.

The Court: What do you say about burden of proof?

Mr. Goldstein: I think the burden of proof is completely the plaintiff's, sir.

The Court: How far? What do you mean by prima facie case?

Mr. Goldstein: Let us take two situations.

The Court: Do you mean he has to prove seniority, too? I think up to that point the burden is on him.

Mr. Goldstein: I think you are faced with only one situation, although the plaintiff seems to plead, as I read the brief or memorandum, that there was a failure to restore. 411

Mr. Durham: No, no.

The Court: We will get to you afterwards.

Mr. Goldstein: But there are certainly an adequate series of admissions in the brief and in the evidence and in the record that he was restored to his position. So that I think we can forget that phase of the case. Having been restored, he comes in and says, in effect, "I am discharged."

Evidence is brought to you to show, first—and this will have to be ruled on by you—that he was not discharged. I say this will have to be ruled on by you.

The Court: We are going to skin this down to the bone. I am going to rule that the nine days he was not provided with work amounts to a discharge, and I say that because of the fact that Congress provided a guarantee of a year's work, and again I say if they could lay him off from day to day it would vitiate all the benefit that that one year was intended to give him. I will give you both an exception as to that. So travel from then on. I am going to rule he was a permanent employee, too, so that you can have the issue squarely decided.

Mr. Goldstein: We are actually thinking aloud. I would say this: The burden would still be on the plaintiff under the act to show, at least prima facie, that there was nothing that could be considered a cause for discharge, conceding for the moment that you have already held that a layoff is a discharge.

The Court: He claims he has a seniority which entitled him to work those nine days.

Mr. Goldstein: Then I think it would be up to the defendant to show he was not senior.

The Court: You agree with me, then.

Mr. Goldstein: After there has been a showing of seniority.

The Court: All he can do is claim a seniority.

Mr. Goldstein: He has to show it.

The Court: How can he show it?

Mr. Goldstein: Very readily, because there has already been an answer. There could not be a dismissal of the complaint unless there was an answer, unless the complaint was so frail in its allegations that it did not even begin, in allegation, to make out a prima facie case.

The Court: Supposing the defendant in this Court, as he can, moved for a bill of particulars, before he answered,

as to how he claims seniority in his complaint, and assume, for a moment, that the motion was granted, which could very well be granted, how would he give that?

Mr. Goldstein: The Rules of Civil Procedure give the plaintiff the right to obtain an examination when he pleads that the information sought in the bill, or in the answer, or motion for bill of particulars, is completely within the control of the defendant. Now, it happens, of course, that under the facts of the instant case I am talking about cases generally, as I think you have noted—but under the facts of the instant case it is clear from the record that, his seniority standing was a matter that was completely open to him, that would have to be posted in the plant and was so posted, for all that we know from the record, so that he could always have access to that. I would like to clinch that in your Honor's mind for sleeping over. You seemed to be a bit troubled when Mr. Smith was speaking about the idea that if Congress granted the restored veteran his job subject to seniority rules, that then that actually placed the veteran in the position of being subject to the unlimited right of the employer to determine what seniority he should or should not have.

The Court: I think the burden under the Selective Service Act puts it on the defendant and nobody else.

Mr. Goldstein: I don't mean that. You felt that you could not conceive that Congress would say to the returned veteran "Here is your job back, but your boss can make such rules of seniority as would rob you of the job."

The Court: No, I did not say that.

Mr. Goldstein: I thought that was implied.

The Court: No. Well, get through with your motion first. Are you through with your motion?

Mr. Goldstein: Yes.

The Court: Motion denied. Don't you think that the whole problem simmers down to this: Is the Colonel right that he is entitled to his job back, no matter whom he

pushes out, for one year? It means that if a fellow is there for 20 years and has a wife and 10 children, Colonel Durham says that Congress intended that this plaintiff be allowed to take his place and he is pushed out. If there is only work for two, or for one, and somebody has to go, the non-veteran has to go, no matter how inequitable it is. That is your point?

Mr. Durham: That is my point. That is the whole issue.

The Court: Your point for Local 13 is that employment of a veteran is the same under that act as it would have been, as far as seniority is concerned, before the act was
419 passed. In other words, if there was no act at all and this plaintiff went down for a job, he would be entitled to a job according to his seniority and, if somebody worked there before him——

Mr. Goldstein: That is not true, sir.

The Court: What do you claim is his seniority right?

Mr. Goldstein: If it were not for the special bargaining position in our collective contract which gives returned veterans a right to claim a job, then in the absence of an Act of Congress those veterans would have no right to get a job.

The Court: You have a collective bargaining agreement with this defendant, haven't you?

Mr. Goldstein: Yes.

The Court: Which sets forth the seniority of the men
420 who belong to your union, or the manner of seniority.

Mr. Goldstein: I am getting at another point. You seem to think Congress would have given this man nothing under Section 8 of the Act if it said to the employer, "You have to reinstate him if he applies within 90 days and fulfills certain conditions." I say Congress gave him a lot, because not all the collective bargaining contracts have the clause that our contract has, that a returned veteran must be restored and given full seniority and put back in his job in

the same order as that accumulated seniority would entitle him to. Many contracts do not have it. So when Congress enacted that section it gave literally hundreds of thousands, perhaps millions, of veterans a right they did not have before, even under a collective bargaining contract."

The Court: What rights did Congress give them?

Mr. Goldstein: The right that Congress gave them was to be restored to the same position, or a position of similar seniority, status and pay, if the veteran fulfills certain conditions and if the employer's conditions were such that he could afford that employment. We interpret that to mean that the veteran in two aspects is governed by the seniority rules, if any, prevailing in the plant. If there are no seniority rules, query. I am not answering the questions as to what would happen. But if there were established seniority rules, the veteran got two rights, first, to be restored to his job, if there is work there, in the same order that he would have been restored after a layoff, namely, in accordance with his seniority standing, and, secondly, after he is restored, to be furnished continuously with work for one year in the same fashion and under the same rules as he would have been furnished work prior to his induction; under the seniority rules, in other words.

The Court: But, according to what you say, Congress, in passing this Act said, "You, when you come back, will have the same rights that you had when you left."

Mr. Goldstein: Precisely. "We are not going to let anybody take anything away from you that you would have had by staying on your job."

The Court: "On the other hand, we are not going to push anybody out to suit you."

Mr. Goldstein: That is right.

The Court: You claim the Colonel is wrong.

Mr. Goldstein: Yes.

The Court: That he is entitled to work providing his seniority calls for it and, if seniority does not call for it, he does not get it.

Mr. Goldstein: That is right, sir.

The Court: So that if a boy was taken to war, we will say, two days after he got his job, and he came back, you will agree, for all practical purposes, he would have very little seniority. Is that right?

Mr. Goldstein: The Act of Congress there is a bit on the ambiguous side. The unions have read it generously towards the veteran by saying "We believe the Act means that he not only gets credit for the two days he worked, but for every day he has been away."

The Court: He may be in a firm like this, with 200 welders. He is No. 200 when he leaves. When he comes back, we will say, for all practical purposes, his seniority is not worth very much. He might have been over there two months, shocked and hurt, and comes back. He is still No. 200.

Mr. Goldstein: That is right, sir. Now, may I give you this one thought? You are implying you cannot conceive Congress meant that for two reasons: first, the boy, in your opinion, does not get much and, second, it appears to you that Congress is leaving the boy at the mercy of the employer who creates the seniority rules. May I suggest this to you: these rules which you think Congress could not have, or should not have, intended to leave in the hands of the employer relate to lay-off and reinstatement, and the Act, Mr. Durham at least contends, is not very clear as to that. Let us look at the same Section. The Congress says that as to insurance and other benefits the rules and practices obtaining in the employer's plant shall govern. What is the insurance? That can be a very valuable right. Some firms I have dealings with have insurance with benefits of $50 to $100 a week.

The Court: He pays towards his insurance right.

Mr. Goldstein: Some firms even don't make their employees give up a contribution.

The Court: The Act, insofar as the veteran is concerned, must be construed liberally in his favor.

Mr. Goldstein: Fine.

The Court: So in taking any situation that might exist, we have to take the worst for his benefit. Supposing he has to pay for that insurance. If he has not got a job, query: how is he going to pay? He is out then. Social security is important, and if he does not get back with this firm and work for a year he is out of work——

Mr. Goldstein: Will you permit me to complete my thinking? Insurance benefits can be highly valuable to an employee. There are pension benefits that can be highly valuable. Vacation rights are very large in some plants. In the shipbuilding industry they run two weeks generally. Sick leave. In the oil producing industry you may get up to 18 weeks of absence for illness, with full pay from the employer. So that when Congress said insurance and other benefits, it was covering a field of benefits that might loom up very large in the mind of the veteran. And yet, what did Congress say? That once the veteran was restored to his job his benefits and rights to these varied perquisites to the job I have just mentioned depend upon the rules and practices established in the plant, either by the employer or——

The Court: Will you stop there for just a minute? Supposing he is not restored to the job. He loses all those benefits.

Mr. Goldstein: That is right.

The Court: And is that what Congress intended?

Mr. Goldstein: Yes, and let me show you why. Just think of this. Put a fellow who is on lay-off four months——

The Court: But he has to get back first.

Mr. Goldstein: I know. Let us say he is back. What will his right to sick benefits be governed by? The rules and practices. Congress said the rules and practices that prevail in the employer's plant. Determined by whom?

Either by the employer unilaterally or by collective bargaining. Now, to that fellow those four months' pay is just as valuable as to Mr. Fishgold were the nine days' pay, and Congress says the right to the four months' pay shall be regulated by the rules and practices established in that plant. Why would it say that, in respect to so valuable a right as the sick leave, the employer can determine it, but, in respect to a right in Mr. Fishgold's case, of much less value, only nine days' employment, he must have an absolute right the employer may not establish? What did Congress mean when it said he shall be restored without loss of seniority? There is no absolute seniority. Seniority is a thing created by agreement. Congress meant he was not to be deprived of seniority. What seniority? The seniority established in the plant by the same method as the rules and practices with reference to insurance.

The Court: Now, wait a minute. Any person who is restored to a position in accordance with the provisions of paragraph A or B. So being restored, a man's position is very important, isn't it?

Mr. Goldstein: Yes.

The Court: And, if he is restored, he gets all the benefits you claim he might have because of his employment, but, if he is not restored, he cannot get those benefits.

Mr. Goldstein: That is right, sir.

The Court: Now, then, let us think a little bit further. Supposing a veteran comes back and he is never restored to his position. Wouldn't it be to the advantage of the company not to take him back, so as to cut him from all these benefits that they have to pay towards, and isn't that what Congress said? "If such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority, status and pay."

Mr. Goldstein: Right. Now, why do they introduce seniority there?

The Court: I think we have read this statute wrong. We read things quickly. "If such position was in the employ of a private employer"—and you admit it was in that employ—"such employer shall restore such person to such position"—to a position like he had when he left—"or to a position of like seniority and status," which means if he left as a first class welder they cannot put him back as a second class welder or as a tacker; they have to put him back as a first class welder.

Mr. Goldstein: That would be under "status".

The Court: That is the seniority they mean.

Mr. Goldstein: No; seniority has nothing to do with pay.

The Court: "Such employer shall restore such person to such position as he had when he left, or a position of like nature" they could have said. 434

Mr. Goldstein: Notice how they spell it out, "seniority, status and pay." You have got to give meaning to "status"; you have got to give meaning to "pay".

The Court: If you stop at "seniority" it is complete. "Status" is an added word which does not qualify the "seniority", and "pay" does not qualify "seniority".

Mr. Smith: "Pay" and "seniority" are not synonymous in this case.

Mr. Goldstein: Neither is "status" and "seniority" synonymous.

The Court: If Congress intended to do what you men say they intended to do, they did not give this veteran a thing. He has got to go back to his union contract and, if there isn't any union contract, he is at the mercy of the employer. 435

Mr. Goldstein: If you want me to join you in criticizing Congress, I will agree with you. The reason they did not give the man a thing is over here (indicating): not because of Section 8 (c), but because of Section 8 (b). Read the last two lines of 8 (b).

The Court: "Unless the employer's circumstances so change as to make it impossible or unreasonable to do so."

Mr. Goldstein: That is where Congress deprived the veteran of everything it purported to give him.

The Court: No; that means if the plant is shut down or they are not doing any work any more, then he cannot get a job.

Mr. Durham: Or not enough work.

Mr. Goldstein: Mr. Durham says not enough work. What happens when there is not enough work? Then it would become unreasonable to put this man back over the employee——

437 The Court: No, no. If there are only ten welders going to be hired tomorrow and there are fifteen war veterans, they take ten of those war veterans and five have to stay out and the five cannot do anything about it because they have hired war veterans anyhow. Isn't that what you mean, Colonel?

Mr. Durham: Absolutely.

Mr. Goldstein: I think if you think of one thing tonight: why Congress should, with respect to shaping up, have said "seniority does not count, you have got to keep this guy at work," but, with respect to other equally valuable perquisites, insurance, sick leave, pensions, vacations, bonuses, said "your rights shall be the rights that you would have had under the rules established by the boss?" Just think of that.

438 The Court: All right. Now we will talk off the record. We will leave that open until tomorrow.

(There was discussion off the record.)

(A recess was taken until 10:30 A. M., August 30, 1945.)

United States Court,
Brooklyn, New York,
August 30, 1945.

Met pursuant to recess.
Appearances as heretofore noted.

(Argument of counsel.)

The Court: Everybody in this case has seriously tried to cooperate in having a very quick and speedy trial. The case has been tried out of order and nobody has tried to do one single thing except help the Court to render a just 140
and fair decision, and I make that public statement because of the fact that I think you all deserve it. I think this veteran will agree he has gotten a very fair trial and nothing has been done in this case by anybody except to give him just that.

(Further argument by counsel.)

## Decision of the Court.

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.] 141

United States Court House,
Brooklyn, N. Y.,
August 30, 1945.

HONORABLE MATTHEW T. ABRUZZO, U. S. D. J.

The Court: In this particular case it is not in dispute that the plaintiff has complied with all of the technical re-

quirements of the statute. He was a welder working for the defendant. I find that his employment was permanent and steady. He left his employment for induction into the armed service of the United States, and had to leave his position for that purpose. He received a certificate in compliance with the statute, that he had been discharged honorably. It is neither in dispute that he is qualified to perform the duties of the position of welder—he was a first class welder—and it is not in dispute that he made his application for reemployment and that he actually was re-employed after making the request under the Selective Service Act.

443 The plaintiff claims that he is entitled to be employed under Section B of the Selective Training and Service Act of 1940, as amended, which reads as follows, referring to the plaintiff's position:

> "If such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority * * *"

and I take that to mean that this plaintiff is entitled to come back to his work as a first class welder and that he is entitled to come back to work in preference to anybody else who might be working on any of the days that he applied for work, except a veteran in his own category.

The proof in this case is that there were forty-six men and five snappers working on the first day, April 9th, who
444 were all non-veterans, and I hold that the defendant has violated the terms of the statute by not employing the plaintiff on April 9th, and that "status" and "pay", unless the employer's circumstances had been changed so as to make it impossible or unreasonable to do so, are merely descriptive words which mean that he had to be taken back as a first class welder and not as a second class welder and that his pay rate would stay the same.

I find, and I do not think there is any dispute, that the defendant's plant had not so changed so that it was impossible or unreasonable to employ this plaintiff, and there is no claim to that effect whatsoever.

In reading subdivision (c), with regard to the benefits which were to be restored to him, it strengthens my belief that that is the way the veteran was entitled to employment under Section B, for the reason that he could not obtain any of the benefits set forth in subdivision (c) until he first got his job back, and Congress intended that he was to be entitled to his job over everybody else but a veteran in his own category. Subdivision (c) strengthens my belief that this interpretation is correct, because it adds the clause that he is to be retained in that position and not discharged within one year after such restoration, because I am convinced that Congress had in mind that a returning veteran should have the opportunity of having one year in which to rehabilitate himself, and one year to avoid open competition with his fellow employees, due to the fact that for two, three or four years he was away.

I am not going into the equity of that situation; I am not concerned with whom he has to displace. That is the way I interpret the statute, and that is the way I interpret the veteran's rights under the Selective Service Act. There is no issue here as to the collective bargaining act, but in passing I might state that the collective bargaining act before me conforms exactly, as far as I can see, to the language of the Selective Service Act. So that if there were any issue as to that, the issue would be the same because the language of the collective bargaining act is the same.

I find that on April 9th and the other eight days that the plaintiff was not allowed to work, non-veterans were employed on each and every one of those days, and I find nothing to the defense that the shaping up of the plaintiff on these nine days is not a discharge, as Local 13 has in

448 *Decision of the Court.*

dicated. They say that he was not discharged, that he was just let out those days, which is not tantamount to a discharge, but I find no merit in that argument, because I believe that Congress intended that during the period of one year any day that there was work, between veterans and non-veterans the veteran was entitled to the preference and he was not to work only if the defendant had no work or had to choose between World War veterans of World War II.

I find that allowing non-veterans to work these nine days is a violation of the statute and the plaintiff is entitled to judgment for these nine days' work.

449 I do not give you a declaratory judgment because the time has expired and you are getting the money judgment that you asked for, nine days, and that judgment will suffice in this particular case. I do not know whether you are entitled to a declaratory judgment. Offhand I would say no, because you asked for a money judgment and I do not think you can confuse the two. But, be that as it may, it is not necessary in this case.

There has been a defense set up here, or a point made, that because of the word "seniority" used in the Selective Service Act it means that welders who worked in this plant and started their work before the plaintiff would be senior to him and that Fishgold could not replace them. That is the defense Local 13 has advanced to this Court, and, to some extent, is the same defense that the Sullivan Shipyard has advanced. In view of my decision, I do not believe it is necessary to make a finding on this point, but, if I had to, on the facts before me I would still find a judgment for the plaintiff.

I think it is only fair to state my reasons for this conclusion. The proof indicates that forty-six men were allowed to work on April 9th who were non-veterans. Their cards are in evidence. It is very confusing to make a determination based on these cards as to just who is senior.

451

because the cards contain the information that some were tackers, some second class welders, and then eventually became first class welders. The dates and the information contained in the cards are very meager. A witness for the defendant testified that seniority in time of employment plus ability was the yardstick used to measure who should or who should not work.

In the confused state of this particular proof I would be inclined to hold that the burden of proof as to that is on the defendant and it has not sustained it. I say that because of the fact that it would be impossible for the plaintiff, nor could it be expected, that he assume this burden when the only evidence as to that is in the possession of the defendant and it would be almost impossible for plaintiff to have access to it without starting his lawsuit. I believe that Congress intended that when the plaintiff showed a prima facie case, if this defense were a good one, it intended the burden to be upon this defendant, and I believe that is the proper place to put this burden.

452

In view of my decision, I will respectfully ask counsel to submit findings of fact, conclusions of law, and a decree just as soon as you can.

MATTHEW T. ABRUZZO,
*U. S. D. J.*

453

**Plaintiff's Exhibit 1.**

Copy of certificate of discharge of plaintiff.

(Omitted pursuant to stipulation.)

454

**Plaintiff's Exhibit 2.**

(Copy)

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA
Brooklyn Local No. 43
5119 Fourth Avenue
Brooklyn 20, New York

March 16, 1945

Mr. Read Smith
Sullivan Dry Dock & Repair Corp.
455 Foot of 23rd Street
Brooklyn, New York

Dear Mr. Smith:

We are taking this opportunity to notify you that we strenuously object to you employing A. Fishgold, welder out of his seniority position during a lay-off, while men with much greater length of service are not put to work.

Under Section 8 of the Selective Service Act, a veteran is to be given his original seniority position. In the event that it becomes necessary to lay men off due to lack of work, each man shall be laid off according to the seniority position in the working agreement.

456

Very truly yours,

John King (Sgd)
John J. King
Business Agent

JJK:EF
uopwa #1

457

**Defendant's Exhibit A.**

Order of National War Labor Board Shipbuilding Commission dated February 25, 1944.

(Omitted pursuant to stipulation.)

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**Defendant's Exhibit B.**

Document relating to arbitration proceeding.

(Omitted pursuant to stipulation.)

458

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**Defendant's Exhibit C.**

Shape-up ticket.

(Omitted pursuant to stipulation.)

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**Defendant's Exhibit D.**

Pay-off slip.

(Omitted pursuant to stipulation.)

459

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**Court Exhibit E.**

Cards covering nine days.

(Omitted pursuant to stipulation.)

460

**Court Exhibit F.**

Book.

(Omitted pursuant to stipulation.)

---

**Court Exhibit G.**

Book.

(Omitted pursuant to stipulation.)

461

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**Court Exhibit H.**

Typewritten sheets.

(Omitted pursuant to stipulation.)

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**Court Exhibit I.**

Employment record of plaintiff.

(Omitted pursuant to stipulation.)

462

463

## Intervenor's Proposed Findings.

UNITED STATES DISTRICT COURT

For the Eastern District of New York.

| | |
|---|---|
| Abraham Fishgold, Plaintiff, against Sullivan Dry Dock & Repair Corporation, Defendant, Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members, Intervenor. | C-5700 |

464

Findings of Fact
and
Conclusions of Law

This matter came on regularly for hearing pursuant to stipulation of the parties and order of this Court on the 20th, 29th and 30th days of August, 1945, before Hon. Matthew T. Abruzzo, District Judge, upon the complaint of plaintiff and issue joined by answer of defendant and the answer of intervenor pursuant to order duly entered herein authorizing intervention as an additional defendant; plaintiff appearing in person and being represented by Knowlton Durham, Esq., his attorney; defendant being represented by J. Read Smith, Esq., its attorney; intervenor being represented by William L. Standard, its attorney, M. H. Gold-

465

466 *Intervenor's Proposed Findings.*

stein and Herman Rosenfeld, Esqs., of Counsel; and Congress of Industrial Organizations, by and through its attorney, Harold Cammer, Esq., having been authorized to appear as *amicus curiae*. Evidence having been introduced on behalf of all the parties, including intervenor, and the Court having heard the oral argument of respective counsel, including *amicus curiae*, and being fully advised in the premises, now makes and enters its:

FINDINGS OF FACT

I

467 Plaintiff is a resident of the Borough of Brooklyn in the City and State of New York.

II

Defendant Sullivan Dry Dock & Repair Corporation at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of New York and maintained a shipyard for the construction and repair of naval and other vessels at the foot of 23rd Street in the Borough of Brooklyn, City and State of New York.

III

The intervenor, Roy Granata, is the Acting President and Acting Treasurer of Local 13, Industrial Union of Marine 468 and Shipbuilding Workers of America, a voluntary association including among its members employees of the defendant at the defendant's shipyard, including plaintiff.

IV

On February 20, 1942, said Local 13 was, pursuant to the National Labor Relations Act, certified by the National Labor Relations Board as the exclusive representative of all the employees, including welders, of defendant.

V

On April 6, 1942, defendant and intervenor, in compliance with the requirements of the National Labor Relations Act, entered into a written collective bargaining agreement (which remained in effect until supplanted by a new collective bargaining agreement executed May 17, 1944), stipulating the terms and conditions of employment which were to prevail in the defendant's shipyard for all defendant's employees, including welders.

VI

Among the provisions of the collective bargaining agreement mentioned in the next preceding finding was Article 470
III, entitled "PROMOTIONS—SENIORITY—TRANSFERS—SHOP STEWARDS", Section 1 of which read as follows:

> "In all cases of promotion, increase or decrease in the working force, the total accumulated length of service and ability to do the job shall be the basis for any said promotions or increases or decreases in the working force."

VII

On or about the 21st day of December, 1942, plaintiff was hired by defendant as a tacker and continued to be employed by defendant until on or about May 22, 1943, on which date he was classified as a third class welder, having 471
attained such latter classification, and the wage rate of $1.00 per hour pertaining thereto, on March 22, 1943.

VIII

On the 22nd day of May, 1943, plaintiff was inducted into the land forces of the United States under the provisions of the Selective Training and Service Act of 1940,

as Amended, for training and service and on said date, in order to perform such training and service, left his position of employment with said defendant.

IX

On or about February 25, 1944, the Shipbuilding Commission of the National War Labor Board, to which said Board had, pursuant to the provisions of the War Labor Disputes Act, delegated authority so to do, issued its Directive Order to the defendant and intervenor requiring them to incorporate into a written collective bargaining agreement the following provision among others:

473 "Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Whenever between two or more men ability is fairly equal, length of service shall be the controlling factor."

X

On May 17, 1944, pursuant to the Directive Order mentioned in the next preceding finding, the defendant and intervenor executed a written collective bargaining agreement incorporating the provision quoted in the next preceding finding.

XI

474 The plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which day he was honorably discharged therefrom and received a certificate certifying that he had satisfactorily completed his period of training and service in the Army of the United States.

XII

Within forty (40) days after plaintiff was relieved from such training and service (that being the period then prescribed in the Selective Training and Service Act of 1940, as Amended, for such application), plaintiff made application to the defendant Sullivan Dry Dock & Repair Corporation for reemployment and such application was granted, and plaintiff was reemployed and restored by defendant, on the 25th day of August, 1944, to the position, status, and pay which he had had on May 22, 1943, namely, third class welder at the rate of $1.00 per hour, and without loss of seniority.

XIII

Thereafter, on September 25, 1944, plaintiff was reclassified by defendant to second class welder at a wage rate of $1.14 per hour, and on December 25, 1944, was reclassified to first class welder at a wage rate of $1.20 per hour.

XIV.

The volume of work in a ship repair yard such as that operated by the defendant fluctuates sharply from day to day and from week to week so that the number of employees required in any type of work by the defendant fluctuates accordingly, and the defendant has, as a consequence, for the last twenty-six years, used a system known as the "shape-up" which has for many years been prevalent in the ship repair industry in the Port of New York, as a method of allocating the amount of work available on any day among its employees.

XV

The procedure whereby said "shape-up" is effectuated is that at the end of the work-day, if there is to be a reduction in the working forces for the following day by reason of

the lowered quantity of work available for any craft, employees in such craft are notified that they need not report to work on the following day, the employees so to be notified being selected at the defendant's repair yard in accordance with the provision of the collective bargaining contract quoted in Findings Nos. VI and IX above.

XVI

At the defendant's ship repair yard, and at all other ship repair yards in the Port of New York, the employment of an employee who is shaped-up is not considered terminated; the employee is not required to remove his tools
479 or other belongings from the employer's premises; the employee is not required to fill out a new application for employment upon return to the yard and assignment to work after receipt of a "shape-up" notice; and the employee's seniority, under the collective bargaining contract between the defendant and the intervenor, is not affected by such "shape-up".

XVII

During the month of March, 1945, the amount of welding work available in the defendant's ship repair yard was insufficient to afford work for all the welders in its employ so that the plaintiff, by reason of his having a shorter total accumulated length of service in the employ of defendant,
480 was shaped-up on one or more days during said month, whereupon plaintiff complained to Selective Service Headquarters, at New York City, which thereupon, in writing, directed defendant not to shape-up plaintiff for a period of one year from August 25, 1944, so long as there was some welding work available, irrespective of the fact that plaintiff had lesser seniority than other welders in the employ of defendant and was, therefore, under the collective bargaining contract between defendant and intervenor,

to be shaped-up if there was insufficient welding work both for him and for other employees possessing greater seniority.

XVIII

Thereafter, during the month of March, 1945, the defendant, pursuant to such instructions from Selective Service Headquarters, shaped-up one G. Jackerson, a welder in its employ, and assigned plaintiff to work, despite the fact that said employee, G. Jackerson, possessed greater seniority than plaintiff and was hence, under the provisions, quoted in the preceding findings, of the collective bargaining contract between defendant and intervenor, entitled to be assigned to work in preference to the plaintiff, if there was insufficient work both for the plaintiff and for other welding employees, including said Jackerson, who had greater seniority than plaintiff.

XIX

Thereafter, on April 2, 1945, intervenor filed with defendant a complaint that defendant had violated said provisions of said collective bargaining contract, which complaint, in accordance with the provisions of said collective bargaining contract, was finally submitted to arbitration by Frank Harris, Esq., who was selected as umpire for that purpose by the National War Labor Board.

XX

Among the provisions of the collective bargaining contract between the defendant and the intervenor was the following:

> "Should any difference arise between the Company and the Union with respect to any grievance or with respect to the meaning or the application of any of

the provisions of this Agreement, they shall be disposed of between the parties hereto and an earnest attempt shall be made to settle such differences within a reasonable time as hereinafter provided.

"In the event that a dispute shall not have been settled satisfactorily between the Union and the Company, said dispute shall be submitted to arbitration. If, within five (5) days after the date of the decision of the Company with which the Union disagrees, the Company and the Union cannot agree upon an Arbitrator, the National War Labor Board shall be asked to designate one whose decision shall be final and binding upon all the parties hereto. It is understood and agreed that any and all matters to be arbitrated under the within contract shall be limited to the interpretation and application of the said Contract."

## XXI

Said umpire, thereafter, on May 4, 1945, issued his award in which he found that G. Jackerson should not have been shaped-up in order to provide work for the plaintiff, but that such shape-up should have been made on the basis of relative length of service in the employ of defendant, or the seniority of said plaintiff and other employees, in accordance with the above quoted provisions of the collective bargaining contract respecting selection of employees for assignment to work when a decrease in the working forces was essential.

## XXII

Thereafter, on May 17, 18, 19, 21, 22, 23 and 24, 1945, and in conformity with such arbitration award of the umpire, the defendant, by reason of there being insufficient welding work available on such days for the plaintiff as well as for all other welders possessing greater seniority

than the plaintiff, did not assign plaintiff to work on such days.

XXIII.

On each of the days referred to in the next preceding finding the welders who were assigned to work by defendant all possessed a greater total accumulated length of service in the employ of the defendant than did the plaintiff, and had ability to perform such work at least equal to that of the plaintiff.

From the foregoing Findings of Fact, the Court concludes as a matter of law: 488

Conclusions of Law

I

Upon his application after his honorable discharge from the armed forces, defendant restored plaintiff, without loss of seniority, to the position which plaintiff held at the time he left the defendant's employ in order to perform training and service required of him under the Selective Training and Service Act.

II

The plaintiff's seniority, and his rights pursuant to such seniority, to be assigned by the defendant to any welding work which it had available for its employees, were, pursuant to the National Labor Relations Act, the War Labor Disputes Act, and the Selective Training and Service Act, such only as provided in the collective bargaining contract between the defendant and intervenor in effect at the time plaintiff left his position with the defendant. 489

490 *Intervenor's Proposed Findings.*

III

The defendant's failure to assign plaintiff to such welding work as was available in its shipyards on April 9 and 11, May 17, 18, 19, 21, 22, 23, and 24, and the assignment thereto instead of such other welders in the defendant's employ as had greater total accumulated length of service for the defendant was

(a) in conformity with and required by said collective bargaining contract; and

(b) in full conformity with, required by, and not in diminution of, or detraction from the seniority of the plain-
491 tiff in his position with the defendant at the time of his induction into the armed forces; was not a discharge within the meaning of Section 8, Subsection (c) of the Selective Training and Service Act of 1940, as Amended; and was in conformity with, and not in violation of, the Selective Training and Service Act of 1940, as Amended.

IV

If the defendant's failure to assign plaintiff to such welding work as was available in its shipyards on the dates mentioned in the next preceding conclusion was a discharge within the meaning of Section 8, Subsection (c) of the Selective Training and Service Act of 1940, as Amended, said discharge was, in conformity with the provisions of
492 said Selective Training and Service Act, for cause, said cause being

(a) the obligation of the defendant, under the National Labor Relations Act, to comply with the provisions of the collective bargaining contract between defendant and intervenor, as to the seniority rules regulating the selection of employees not to be assigned to work in the event a decrease in working forces became necessary;

(b) the obligation of the defendant under the provisions of the National Labor Relations Act and the War Labor Disputes Act to comply with the umpire's arbitration award; and

(c) lack of sufficient welding work on the dates aforesaid to afford work to both the plaintiff and all other welders of at least equal ability to perform such work and greater total accumulated length of service in the employment of the defendant; and the consequent necessity upon the defendant to reduce the working force on such days, including plaintiff in such temporary reduction in the working force.

V

Provisions of the Selective Training and Service Act of 1940, as Amended, do not require that the defendant should assign the plaintiff to work in preference to non-veteran welders employed by the defendant who possess relatively equal skill and greater seniority, determined pursuant to the collective bargaining contract between the defendant and intervenor, than the plaintiff, when the amount of welding work available at the defendant's shipyard was such that there was not sufficient work for plaintiff as well as such other welders.

VI

Plaintiff was not entitled to be assigned to work by defendant on the days mentioned in the third conclusion of law above since there was only sufficient work available to keep welders in the employ of the defendant with greater accumulated total length of service for the defendant employed on each of such days.

VIII

The defendant did not, as to the plaintiff, violate the Selective Training and Service Act of 1940, as Amended,

496 *Findings of Fact and Conclusions of Law.*

in this case, and is, therefore, entitled to judgment in his favor.

Done in open Court this day of September, 1945.

*United States District Judge.*

Presented by:

William L. Standard,
Attorney for Intervenor,
M. H. Goldstein and
Herman Rosenfeld,
Of Counsel.

497

## Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT

For the Eastern District of New York.

Abraham Fishgold,
Plaintiff,
against
Sullivan Dry Dock & Repair Corporation,
Defendant,

498 Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor.

C-5700

This matter came on regularly for hearing pursuant to stipulation of the parties and order of this Court on the

20th, 29th and 30th days of August, 1945, before Hon. Matthew T. Abruzzo, District Judge, upon the complaint of plaintiff and issue joined by answer of defendant and the answer of intervenor, pursuant to order duly entered herein authorizing intervention, plaintiff appearing in person and being represented by Knowlton Durham, Esq., his attorney, defendant being represented by J. Read Smith, Esq., its attorney, intervenor being represented by William L. Standard, its attorney, M. H. Goldstein and Herman Rosenfeld, Esqs., of Counsel, and Congress of Industrial Organizations by and through its attorney, Harold Cammer, Esq., having been authorized to appear as *amicus curiae* and evidence having been introduced on behalf of all the 500
parties, including intervenor, and the Court having heard the oral arguments of respective counsel, including *amicus curiae*, and being fully advised in the premises, now makes and enters its:

FINDINGS OF FACT

I

That plaintiff is a resident of the Borough of Brooklyn in the City and State of New York.

II

That defendant Sullivan Dry Dock & Repair Corporation at all times hereinafter mentioned was a corporation organ- 501
ized and existing under the laws of the State of New York and maintained a shipyard for the construction and repair of naval and other vessels at the foot of 23rd Street in the Borough of Brooklyn, City and State of New York.

III

That the intervenor Roy Granata is the Acting President and Acting Treasurer of Local 13, Industrial Union of

Marine and Shipbuilding Workers of America, which is a voluntary association, including among its members workers, including plaintiff, in the defendant's shipyard and that the Congress of Industrial Organizations, appearing herein as *amicus curiae*, is the parent body of which Local 13 is an affiliate and the Local Representative of the parent body.

IV

That the plaintiff entered the employ of the defendant, Sullivan Dry Dock & Repair Corporation, as a welder on or about the 21st day of December, 1942, and was employed by said defendant in that position steadily until on or about the 22nd day of May, 1943, and that such position occupied by the plaintiff with the defendant was other than a temporary position.

V

That on the 22nd day of May, 1943, plaintiff was inducted into the land forces of the United States under the provisions of the Selective Training and Service Act of 1940, as Amended, for training and service and on said date, in order to perform such training and service, left his position of employment with said defendant.

VI

That, thereafter, the plaintiff served in the Army of the United States from the 22nd day of May, 1943, until the 12th day of July, 1944, on which day he was honorably discharged therefrom and received the certificate prescribed in Section 8 of the Selective Training and Service Act of 1940, as Amended, certifying that he had satisfactorily completed his period of training and service in the Army of the United States.

VII

That, at the time of his discharge and at the time of his application to his employer for reemployment, plaintiff was qualified to perform the duties of the position of first-class welder which he had held in the defendant's employ and which he had left upon his induction into the Army of the United States.

VIII

That within forty (40) days after plaintiff was relieved from such training and service (that being the period then prescribed in the Selective Training and Service Act of 1940, as Amended, for such application), plaintiff made 506
application to the defendant Sullivan Dry Dock & Repair Corporation for reemployment and such application was granted, and plaintiff was reemployed and restored as a first-class welder on the 25th day of August, 1944.

IX

That, thereafter, the plaintiff was employed steadily and continuously by the defendant in such position until the 9th day of April, 1945, on which day the defendant refused to employ the plaintiff and to permit him to work and said defendant furthermore refused to employ and permit the plaintiff to work in his said position on the following days, namely, April 11, May 17, May 18, May 19, May 21, May 22, May 23 and May 24, 1945, and that on each of said 507
days plaintiff's wages, had he been employed by the defendant, would have amounted to Nine and 60 100 Dollars ($9.60) for eight hours of work, and that on each of said days plaintiff was available for work in the defendant's shipyard.

508 *Findings of Fact and Conclusions of Law.*

X

On each of the days mentioned in the preceding Finding, on which the plaintiff was denied work by the defendant, the defendant's plant was in operation and other employees, possessing the same or comparable skill as the plaintiff, were employed and continued at work by the defendant.

XI

That on each of said days referred to in the preceding two Findings, none of the welders, who were employed and continued at work by the defendant doing work similar to the work plaintiff was qualified to do, had served in and
509 been discharged from the Armed Forces of the United States in World War II.

XII

That on April 9, 1945, the first of the days on which the plaintiff was refused work by the defendant, as stated in Finding "IX" there were forty-six (46) welders and five (5) "snappers", or boss welders, working for the defendant in its said shipyard, none of whom had served in and been discharged from the Armed Forces of the United States in World War II.

XIII

That on each of the other days on which plaintiff was
510 denied work by the defendant, as set forth in Finding "IX", there were as many or more welders and "snappers" as on April 9, 1945, working for defendant in its said shipyard, none of whom had served in and been discharged from the Armed Forces of the United States in World War II.

XIV

That under the provisions of the Selective Training and Service Act of 1940, as Amended, plaintiff was entitled to be retained in his employment with defendant for a period

of one (1) year after restoration to his position with defendant in preference to non-veteran employees even though their length of service with the defendant was greater than plaintiff's, including his service in the Armed Forces as service with defendant.

XV

That the burden of proving seniority under the Selective Training and Service Act of 1940, as Amended, is a duty imposed upon the defendant and the Court finds there was a failure of proof to sustain that burden.

XVI 512

That defendant laid off or "shaped up" the plaintiff upon the nine (9) days specified in Finding "IX" contrary to the provisions of the Selective Training and Service Act of 1940, as Amended.

And from the foregoing Findings of Act, the Court concludes as a matter of law:

CONCLUSIONS OF LAW

I

That the position of first-class welder which the plaintiff left, in order to perform training and service under the Selective Training and Service Act of 1940, as Amended, was other than a temporary position in the employ of 513
the defendant Sullivan Dry Dock & Repair Corporation.

II

That the position as first-class welder in which the plaintiff was employed by the defendant which he left to perform the training and service referred to in the preceding Conclusion was a position in the employ of a private employer and at the time when the plaintiff made application for re-employment the defendant's circumstances had not so

514 *Findings of Fact and Conclusions of Law.*

changed as to make it impossible or unreasonable for the defendant to restore the plaintiff to such former position.

III

That application within forty (40) days after plaintiff received his Honorable Discharge (Ptff.'s Ex. 1) on July 12, 1944; and the prescribed certificate of satisfactory service, satisfied the requirements of Section 8 of the Selective Training and Service Act of 1940, as Amended (Sec. 308, Title 50 (App. U. S. C. A.), and it was not necessary under the said Act and the facts and circumstances of this case for plaintiff to make application for his former position
515 prior to that time.

IV

That the refusal of the defendant to employ the plaintiff and permit him to work in his position as welder on April 9 and 11, and May 17, 18, 19, 21, 22, 23 and 24, 1945, referred to throughout the testimony in this case as "shaping-up", constituted a discharge from his position of employment with defendant and a violation of the prohibition of Section 8 (c) of said Act against discharge "from such position without cause within one year after such restoration"; and that the defendant violated the provisions of said Statute by not employing the plaintiff on each of such days.

516 V

That the provisions of Section 8 of the Selective Training and Service Act of 1940, as Amended, required in the instant case that the defendant employ the plaintiff in preference to other non-veteran welders possessing comparable skill and experience having greater seniority than the plaintiff, if the conditions at the defendant's shipyard were such on any of the days plaintiff was "laid off" from

work that there were not sufficient jobs available for all the welders applying for work.

VI

That the plaintiff was entitled to his position on each of the days as stated in the previous Conclusion of Law.

VII

That the defendant, in allowing non-veterans to work on the nine (9) days stated in the preceding Conclusion in preference to the plaintiff, violated the Selective Training and Service Act of 1940, as Amended, and the plaintiff is entitled to judgment for the amount of wages he would 518
have received had he worked on each of said days.

Done in open Court this 16 day of October 1945.

s/s Matthew T. Abruzzo,
*United States District Judge.*

Presented by:

Knowlton Durham,
Attorney for Plaintiff.

519

520

## Decree Appealed From.

### UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

ABRAHAM FISHGOLD,
Plaintiff,
against
SULLIVAN DRY DOCK & REPAIR CORPORATION,
Defendant,
521
ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor.

C-5700

This matter came on regularly for hearing pursuant to stipulation of the parties and order of this Court on the 20th, 29th and 30th days of August, 1945, before Honorable Matthew T. Abruzzo, District Judge, upon the complaint of plaintiff and issue joined by answer of defendant and
522 the answer of intervenor, pursuant to order duly entered herein authorizing intervention, plaintiff appearing in person and being represented by Knowlton Durham, Esq., his attorney, defendant being represented by J. Read Smith, Esq., its attorney, intervenor being represented by William L. Standard, Esq., its attorney, M. H. Goldstein and Herman Rosenfeld, Esqs., of counsel, and the Congress of Industrial Organizations by and through its attorney, Harold Cammer, Esq., having been authorized to appear as *amicus curiae*.

and evidence having been introduced on behalf of all the parties, including intervenor, and the Court having heard oral arguments of respective counsel, including *amicus curiae*, and being fully advised in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law, now therefore, it is:

ORDERED, ADJUDGED AND DECREED that the plaintiff, Abraham Fishgold, do recover of the defendant, Sullivan Dry Dock & Repair Corporation, the sum of eighty-six and 40/100 ($86.40) dollars.

Dated: New York, N. Y., October 16, 1945.

s/s MATTHEW T. ABRUZZO,
*U. S. D. J.*

526

## Notice of Appeal.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

ABRAHAM FISHGOLD,
Plaintiff-Respondent,

against

SULLIVAN DRY DOCK & REPAIR CORPORATION,
527 Defendant,

ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members,
Intervenor-Appellant.

*Sirs:*

PLEASE TAKE NOTICE that Roy Granata, as Acting Pres-
528 dent and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O., an unincorporated association of more than seven members, the intervening defendant herein, hereby appeals from the final decree of this Court entered in the Clerk's Office on the 16th day of October, 1945, and from each and every part of said decree to the United States Circuit Court of Appeals for the Second Circuit to be held in and for the

said Circuit, at the City of New York, in the Southern District of New York.

Dated: New York, November 14, 1945.

Yours, etc.,

WILLIAM L. STANDARD,
Attorney for Intervening Defendant-Appellant,
291 Broadway,
New York 7, N. Y.

To:

J. READ SMITH, Esq.,
Attorney for Defendant,
44 Court Street,
Brooklyn, N. Y.

KNOWLTON DURHAM, Esq.,
Attorney for Plaintiff,
70 Pine Street,
New York, New York.

532

## Stipulation as to Exhibits.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that all the exhibits admitted in evidence on the trial of this action may be omitted from the record on appeal herein, except Plaintiff's Exhibit 2, which is printed in full herein.

533 IT IS FURTHER STIPULATED that said exhibits may be handed up to the Court upon the argument of the appeal and may be referred to in the briefs of the respective parties hereto with the same force and effect as if printed herein in full.

Dated, New York, December , 1945.

WILLIAM L. STANDARD,
Attorney for Intervening
Defendant-Appellant.

KNOWLTON DURHAM,
Attorney for Plaintiff-Appellee.

534

J. READ SMITH,
Attorney for Defendant.

535

## Stipulation as to Record.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record of the said District Court in the above-entitled cause, as agreed on by the parties.

Dated, New York, December , 1945.

536

WILLIAM L. STANDARD,
Attorney for Intervening
Defendant-Appellant.

KNOWLTON DURHAM,
Attorney for Plaintiff-Appellee.

J. READ SMITH,
Attorney for Defendant.

537

## Clerk's Certificate.

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE.]

I, PERCY G. B. GILKES, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of record of the said District Court in the above-entitled cause, as agreed on by the parties.

539

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Eastern District of New York on the day of December in the year of our Lord one thousand nine hundred and forty-five, and the independence of the United States the one hundred and seventieth.

PERCY G. B. GILKES,
Clerk.

(Seal)

540

[fol. 181] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 196

(Argued February 5, 1946. Decided March 4, 1946)

Docket No. 20092

ABRAHAM FISHGOLD, Plaintiff-Respondent,

against

SULLIVAN DRYDOCK & REPAIR CORPORATION, Defendant; ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O., an Unincorporated Association of More than Seven Members, Intervenor-Appellant

Before L. Hand, Chase and Frank, Circuit Judges

Appeal by an intervening industrial union from the judgment of the District Court for the Eastern District of New York, awarding damages to the plaintiff against the defendant Sullivan Drydock and Repair Corporation, under § 8(c) of the Selective Training and Service Act of 1940 (§ 308(c), Title 50, Appendix, U. S. Code).

[fol. 182] M. H. Goldstein, for the Industrial Union; Knowlton Durham, for the appellee; John F. Sonnett, for the United States, as Amicus Curiae; Lee Pressman and Witt & Cammer, filed a brief for the Congress of Industrial Organizations, as Amici Curiae; Samuel J. Cohen, Frank L. Mulholland, Clarence M. Mulholland, and Williard H. McEwen and Mulholland, Robie and McEwen of Counsel, filed a brief for the Railway Labor Executives Association, as Amici Curiae.

L. HAND, Circuit Judge:

Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America appeals from a judgment awarding damages to the plaintiff for his loss of wages because of two lay-offs by his employer, the Sullivan Drydock and Repair Corporation, against which alone the action was brought. The union intervened, and charged

itself with the defence; the United States, the Railway Labor Executives Association and the Congress of Industrial Organizations have filed briefs, as *amici*. The appeal raises only the proper interpretation of subdivision (b) and (c) of § 8 of the Selective Training and Service Act of 1940, as amended in 1942 (§ 308(a) and § 308(b), Title 50, Appendix, U. S. Code, which we quote in the margin).* The facts as found by the judge were as follows:

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* "8(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

"8(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

[fol. 183] The plaintiff entered the employ of the Sullivan Drydock and Repair Corporation as a welder, on December 21, 1942, and was steadily employed as such until May 22, 1943, when he was inducted into the Army. He served until July 12, 1944, and was then honorably discharged, and received a certificate of the kind described in § 8(a). At that time he concededly was, and he has since been, qualified as a first-class welder; and the company restored him to this former position on August 21, 1944, and has never dismissed him. The controversy here at bar arises because on three occasions: viz., on April 9, April 11, and from May 17 to May 24, inclusive, it refused to give him any work, because there was not enough on those days to occupy all hands. In so refusing it preferred other welders, not veterans, who had a higher shop seniority than the plaintiff: this in accordance with the agreement between the company and the union. The plaintiff's posi-
[fol. 184] tion is that, as a veteran, § 8(b) and § 8(c) gave him priority over all his fellows except other veterans; the union's position is that those sections merely restored him to the same place in the shop hierarchy which he would have had, if he had been on leave of absence during the period of his service. The judge held with the plaintiff and the union appealed.

Subsection B of § 8(b) is the operative source of the privilege on which the plaintiff relies; it reads as follows: "Such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible to do so." "Such position" is nowhere defined except as "a position other than a temporary position, in the employ of any employer." Taking this clause by itself, it seems to us beyond debate that it was not intended that the veteran should gain in seniority. It will be observed that the grant is in the alternative: he is to be "restored" to his original position, or to one of "like seniority, status and pay," whenever possible. The phrase, "like seniority" means the "same seniority" as before; and it necessarily precludes any gain in seniority. It follows that, if the original position is no longer open, the substitute shall be a position of no greater, though no less, seniority than the lost position. But if that be true, there can be no implication that, if the original position be not lost, but be still available, the veteran shall be re-

stored to it with a gain in priority; for that would presuppose that Congress did not intend the substitute to be as nearly a complete substitute for the lost original as it was possible to make it, a hypothesis absurd on its face. Hence we must start with the proposition that subsection B of § 8(b) not only did not grant any step up in seniority, but positively denied any.

[fol. 185] Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been "on furlough or leave of absence" while he was in the service. How far that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be. Having in this way declared how the veteran's interim position "shall be considered," Congress added that he should be "restored without loss of seniority." Had the purpose been, not only to insure the veteran that he should not lose any more steps upon the ladder than if he had been on leave, but also that he should go to the top, we cannot conceive that Congress would have expressed itself in the words, "without loss of seniority." They have no such express meaning, and their implications are directly the opposite; for they disclose a concern against his possible demotion inconsistent with any implied belief in his promotion. For these reasons we are satisfied that, except for the concluding phrase of subdivision (c) there can be no doubt that textually the union's construction is the right one. It remains to consider that phrase which, as we understand it, is the chief reliance of those who take the opposite view.

It declares that the veteran "shall not be discharged from such position within one year after such restoration"; and we should, so far as possible, interpret it so as not [fol. 186] to conflict with the rest of the section; in particular, so as to leave untouched the privilege of seniority, as it is earlier defined. There is no difficulty in doing so, if

"discharge" means a permanent end to the relation of employment, a separation, a dismissal; and that is indeed its ordinary meaning. For example, the Oxford Dictionary (Vol. II, p. 412, sub title "Discharge" [ 3), reads: "To relieve of a charge or office; (more usually) to dismiss from office, service or employment; to cashier": this in distinction with "Lay-off," (Supplement, p. 8): "A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off season." It seems to us that Congress used "discharge" in this sense: i.e., that the veteran was to be assured of his job for the same period—a year—for which he was to be drafted; but that the job to which he was "restored"—as that very word implies—was to be subject to the same conditions to which the old job had been subject with only the exception that it should be better in so far as a leave of absence for the year might improve it. The value of that assurance would indeed vary. In a closed shop it would presumably add little, for the union would not allow a member to be discharged without cause anyway. In an open shop the same would be true, if it were partly unionized, and the veteran were in the union; but, whenever for any reason he had not that protection it prevented his being turned out, so long as he behaved himself, and that was an advantage of no mean importance. We do not know what proportion of those in industry are not in unions; but their number is certainly very large, and, even though the clause was of value only to them, they are numerous enough to give it a purpose; to say [fol. 187] nothing of the possibility that statutory protection may be an important supplement to union protection.

When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly

insisted that no troops should be sent overseas. The original act limited service to one year; and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September, 1941. Congress was calling young men to the colors to give them an adequate preparation for our defence, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; but we have not to decide what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which § 8(b) and § 8(c) were cast.

[fol. 188] The plaintiff argues, however, that, regardless of their original scope, these sections have in any event by administrative interpretation and by later legislation, taken on the meaning which he claims. We shall consider first the administrative interpretations. Section 8(g) directs the Director of Selective Service to establish a "Personnel Division" which shall "render aid in the replacement in their former positions of and in securing positions for * * * persons who have satisfactorily completed any period of their training and service under this Act," and on March 5, 1944, the Director issued a memorandum (No. 190-A, Part IV, § 4(b)), which read: "A veteran who has been reinstated to his former position cannot be displaced by another on the ground that the latter has greater seniority rights." Section 8(c) directs the proper district attorney, "if reasonably satisfied" that a veteran "is entitled" to the benefits of the Act, to "appear and act as attorney" for him to enforce his rights; and the Attorney General, as appears from his intervention as *amicus* in this action, has read the law like the Director of Selective Service. On the other hand, the National War Labor Board adopted the opposite view in *In Re Scovill Manufacturing Co.*, 21 W. L. R. 200; as have several of its arbitrators; and the Solicitor of the Department of Labor

did the same in an instruction for the guidance of federal conciliators in dealing with war veterans (16 L. R. R. 481).

So far as we can find, these are the only interpretative rulings that have as yet appeared by officials who can be said to have been charged with any duty in administering the Act; and it can hardly be said that they have had that consistency to which we should yield our judgment. We do not forget that the canon which the plaintiff invokes is not confined to decisions *inter partes*, like those of the Federal Trade Commission, the Interstate [fol. 189] Commerce Commission, the Labor Board, or the Tax Court; it extends also to the interpretations of officials, charged with the duty of enforcing statutes. *Skidmore v. Swift*, 323 U. S. 134; *Great Northern Railway Co. v. United States*, 315 U. S. 262. Whether the weight to be given to such rulings is less than to regulations for the conduct of, or decisions in, contested cases, has never been expressly decided, though — was intimated in *Skidmore v. Swift*, *supra*, p. 139; and see Judge Frank's dissent in *Duquesne Warehouse v. Railroad Retirement Board*, 148 Fed. (2) 473, 485-487. There is indeed a basis for making such a distinction because the position of a public officer, charged with the enforcement of a law, is different from one who must decide a dispute. If there is a fair doubt, his duty is to present the case for the side which he represents, and leave decision to the court, or the administrative tribunal, upon which lies the responsibility of decision. If he surrenders a plausible construction, it will, at least it may, be surrendered forever; and yet it may be right. Since such rulings need not have the detachment of a judicial, or semi-judicial decision, and may properly carry a bias, it would seem that they should not be as authoritative; and of this sort were the rulings of the Director and the Attorney General in the case at bar, unlike the decisions of the War Labor Board and the direction of the Solicitor of the Labor Department. Be that as it may, concededly all such considerations are only cautionary, and not authoritative; for in the end, after whatever reserve, upon the courts rests the ultimate responsibility of declaring what a statute means: as the Supreme Court recognized in its last word upon the subject. *Jewell Ridge Corp. v. Local*, 325 U. S. 161. We should have to be in much greater doubt than we

[fol. 190] are, if we were to yield, even to a more uniform administrative interpretation than exists here.

There remains the question whether the amendment of § 8 in December, 1944, and the extension of the whole act until May 15, 1946, is to be taken as embodying the Director's position. The amendment, taken alone, only extended the time within which a veteran might apply for reinstatement from forty days to ninety days, and made that period begin from the termination of "hospitalization continuing after discharge for a period of not more than one year," if he was in a hospital. Of itself this indicated no other change in intent; but the Director's ruling had been made for over six months in December, 1944. Moreover, Colonel Keesling, of the Director's office, in one part of his testimony before the subcommittee of the Committee on Military Affairs, stated the Director's position. His later remarks were, perhaps, somewhat ambiguous, and we are left in doubt as to the final impression which his testimony as a whole may have left on the subcommittee. After he had first mentioned the subject, the presiding chairman, Mr. Costello, wished to revert to it, and the Colonel thereupon read the Act as it stood, and a colloquy ensued which we quote in the margin.* He was then speaking of the fact that the

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*"Mr. Johnson: And the time he serves in the armed forces does not affect his seniority?

Colonel Keesling: That is right. He shall be restored without loss of seniority.

Mr. Harness: Does that mean he does not lose any of the seniority he has acquired up to the time of his induction, or that he gets that seniority that has accrued to him while he was working, plus the time he served in the Army?

Colonel Keesling: The latter is right.

Mr. Harness: Whose construction is that?

Colonel Keesling: Ours. The language is clear. It says that a person so restored shall be restored without loss of seniority.

Mr. Johnson: It is not clear that that means his former seniority.

Colonel Keesling: Would it not be loss of seniority if a nonveteran increased his seniority by 2 years without credit-

[fol. 191] veteran's absence from the shop should be counted as though he were on leave, or on furlough; and whether his hearers assumed that this was consistent with what he had said before, or supplanted it, is not entirely certain.

However, we cannot in any event assimilate the situation to that to which courts so frequently resort in aid of the interpretation of ambiguous language; i.e., reenactment without change after administrative interpretation. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492; *National Lead Co. v. United States*, 252 U. S. 140, 146; *Massachusetts Mutual Life Insurance Co. v. United States*, 288 U. S. 269, 273. The rationale of that canon must be, either that those in charge of the amendment are familiar with existing rulings, or that they mean to incorporate them, whatever they may be. The second would hardly be tenable; we should hesitate to say that Congress might enact as law regulatory provisions with which it concededly had no acquaintance. On the other hand, if we are to suppose, in the absence of evidence to the contrary, that Congress is familiar with all existing administrative interpretations, and is content to accept them when it makes no change, it would seem that the force of that assumption should vary with the circumstances. For example, successive recensions of the Internal Revenue Act are the result of detailed conferences between the Treasury and the committees of Congress; [fol. 192] and there is good reason to assume that, in so far as the statute is not changed, existing regulations and even less formal interpretations are expressly affirmed. That may well be a proper inference in the case of all general recensions, accompanied as these ordinarily are by continuous and intimate consultation with adminis-

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ing an employee with 2 years' seniority for the 2 years he spent in the armed forces?

Mr. Johnson: It might mean without loss of what he had before.

Colonel Keesling: That is not the way we have construed it. There has not been any difference of opinion on that as far as the labor groups are concerned. The act says any person who is restored shall be restored without loss of seniority."

trative officers. But it would seem hazardous to carry such a conclusion to the situation here at bar. So far as concerns any actual information conveyed to Congress, it was at most confined to the occasion which we have discussed, for it would be gratuitous to suppose that the same information ever reached the Senate Committee of Military Affairs. That aside, the same ambiguity arises here, if we were to impute to Congress a knowledge of all administrative rulings, as arises from the rulings themselves, for the decisions of the National Labor Relations Board and of the Solicitor of the Labor Department both preceded the amendment of § 8(c). To suppose that Congress was familiar with one set of rulings and not with the other would be baseless in fact, and involve the canon in greater uncertainty than already attaches to its use, which—be it said with all deference—is by no means negligible. We should be clutching at straws and relying on phantoms, if we were to suppose that the re-enactment of this section with its very specific amendment was intended to effect so vital a change in industrial relations. Certainly we should be unwarranted in believing that Congress would have made so far reaching a change without notice to those who had an interest equal with the veterans themselves—the unions. Finally, as in the case of the effect of such rulings unaccompanied by any amendment of the statute, when all is said, the canon is only a help when the intent is otherwise in doubt; [fol. 193] and, after every allowance for the differences which have actually arisen, we cannot bring ourselves to abandon the construction we have adopted. As for judicial interpretation, this is the first appeal; and the only decisions in the district courts are apparently equally divided. *Whirls* v. *The Trailmobile Company* (D. C. S. D. Ohio), is against the view we take; *Olin Industries Inc.* v. *Barnett* (D. C. S. D. Ill.) is in accord. The fact that we are ourselves not agreed cautions us that we should not be too sure of our conclusion; and obviously the really important matter is that the question should reach the Supreme Court as soon as possible.

We cannot conclude without expressing the hope, though it may not be realized, that our decision may not be taken as indicating any indifference to the claims of those who

stood by the nation in the hour of its need at the hazard, and so often with the loss, of all that life holds dear.

Judgment reversed; complaint dismissed.

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CHASE, Circuit Judge (dissenting):

I cannot believe that § 8(b) and (c) of the Selective Service Act as amended has been given the effect intended by Congress. It has been construed to mean that an honorably discharged veteran is entitled upon timely application to be restored to his old job, such a job having, as here, continued to exist, and to keep it for a year unless discharged for cause only if his employer has not, by contract with a third party otherwise agreed. That seems to be too narrow a construction to put upon a remedial statute which ought to be interpreted liberally in favor of the veterans for whose benefit it was enacted. See *Boone* v. *Lightner*, 319 U. S. 561, 575.

[fol. 194] There is no real controversy between the appellee and his employer who took no appeal and who had previously restored to the veteran the position he had formerly held; had kept him continuously at work in it for about seven months; and would presumably have continued so to do for at least a year but for action by the intervening union. The latter which is the sole appellant insisted that it had the contractual right to have the veteran displaced whenever necessary to make room for a non-veteran union member who had been employed about a month and a half before the plaintiff had originally been hired and the employer yielded to this demand. The ability of the plaintiff to do the work is unquestioned and it is not even intimated that he gave any cause for discharge.

Thus the clear cut issue is whether Congress intended by this statute to make sure that those who were required by it to terminate their non-temporary employment and serve in the armed force should also be entitled by it to resume their former employment, or the equivalent, and keep that for a year after their honorable discharge from service, provided they were and continued to be able and willing to fill the position satisfactorily; or whether Congress merely left this appellee and others like him with nothing but the right to have their time in the armed forces

counted as time worked for their old employers as they competed with others not displaced by the statute, for their old jobs, or ones as good, according to whatever standards of competition their employers and some third party by contract saw fit to impose upon them. And if the correct construction of the statute be that Congress intended to let returned veterans try to readjust themselves as best they might with only an unimpaired "seniority status, and not, when there were such jobs, an actual job with actual pay on which they could live at least for a [fol. 195] year, I must say with all deference, that words were used which have virtually to be read out of the statute so to restrict its meaning.

Congress first provided in § 8(b) (A) and (B) of the statute for the kind of positions honorably discharged veterans should get. They should be restored (1) to their *former* positions. In providing for that seniority was not even mentioned. Then (2) in the alternative to give the equivalent to men whose former positions were non-existent, it was provided that the veteran be given a position "of like seniority, status, and pay." The words just quoted are those defining not some relative "position" in a figurative line of men available for work but a position in which the veteran could actually work. The words "a position of like seniority, status, and pay" are but the equivalent in their setting of "a job just as good with equal pay." Moreover, the definition of the alternative position plays no proper part in this case anyway since the appellee was restored to his old position and I mention it only because it seems to have been relied on as some justification for construing § 8(c) as the majority has done. It is there that the decisive provision is found.

After having made it plain in § 8(b) that the veteran should get his old job back or be offered one as good, Congress next in § 8(c) made equally clear in plain language that certain privileges went with the job. They are of two kinds. The first is that the position carries with it the right of the former employee thus re-employed to be treated as though he had been "on furlough or leave of absence during his period of training and service in the land or naval forces" and accordingly he shall suffer no "loss of seniority, (and) shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on

[fol. 196] furlough or leave of absence with the employer at the time such person was inducted into such forces. * * * *" Thus far the returned veteran is given but the status of an employee who has been furloughed or given a leave of absence without actual termination of employment and I agree that his insurance or other like beneficial status is to be determined under the rules and regulations applicable thereto when he was inducted and that for this purpose the statute requires it to be done on the basis of no loss of his seniority while away. Yet only in that respect was seniority made to count and then only negatively in that no loss should be suffered by any relative diminution of it because of absence. Then Congress, not content to provide that much and no more, in § 8(c), also gave the veteran another and different kind of privilege which was not made dependent in any way upon his seniority status as an employee or upon his rights as such an employee on furlough or on leave of absence. It is an added and independent right conferred in clear and plain words which people who want to express their thought unmistakably customarily use. They are "and shall not be discharged from such position without cause within one year after such restoration." Unless these words mean that after an honorably discharged veteran has been given the position to which he is entitled under the statute he may keep at work in it for a year provided there is such work to be done and he gives no cause for his discharge, I submit they mean nothing.

Congress was here prohibiting not merely discharge from employment but discharge from "such position." It did not leave the employer free, to "lay-off" the re-employed veteran at will, or to shift him from one position to another not as good, or otherwise deprive him of the particular kind of work and pay to which he had been "restored." It gave the veteran a year of security in this position be- [fol. 197] fore he could be ousted from it simply because someone had a contract with the employer which, but for the statute, gave him a senior right to it. To deny the veteran the right to work in that position during the year is a "discharge" from it for the period of his deprivation and calling such action a "lay-off" or anything else one may choose for a name neither alters the fact nor justifies the action. Such a choice of labels is simply what should be recognized as a futile attempt to circumvent the statute.

Moreover, if this to me seemingly plain and simple language may fairly be said to have had at first some ambiguity lurking in it, the interpretation of it by the Director of Selective Service should be enough to clear that up for present purposes. It was made by the Director in performing the duties the statute required him to perform and though not of course binding upon the courts it is entitled to the same respect that is now customarily given like interpretations of statutes by other administrative officers acting in the performance of their duty. That interpretation alone would be most persuasive for it was at least a reasonable one. *Skidmore* v. *Swift & Co.*, 323 U. S. 134; *Overnight Motor Transp. Co.* v. *Missel*, 316 U. S. 572; *Great Northern Railway Co.* v. *United States*, 315 U. S. 262; *Baze* v. *Scott*, Cir. 10, 106 F. (2) 365. But it doesn't stand alone. After it was well and widely known that it had been made Congress by the re-enactment of § 8(c) without change gave potent evidence in addition to the words themselves that it meant what it said in § 8(c) when it said that "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) * * * shall not be discharged from such position without cause within one year after such restoration." See *United States* v. *Midwest* [fol. 198] *Oil Co.*, 236 U. S. 459; *McCaughn* v. *Hershey Choc. Co.*, 283 U. S. 488; *National Lead Co.* v. *United States*, 252 U. S. 140; *Mass. Mut. Life Ins. Co.* v. *United States*, 288 U. S. 269.

Undoubtedly Congress could by statute override private contracts between employers and employees or those acting for them. It did so when under the Selective Service Act men holding positions of employment were inducted. It could, as it did, displace others later whenever necessary to make room for veterans qualified for and seeking their old positions.

And finally Congress passed this statute for the benefit alike of all honorably discharged veterans who had been taken from employment more stable than what is called temporary. There is no discernible purpose not to treat them all the same and no good reason why Congress should not have intended to make a man who was inducted from a closed shop as secure in his job during the first year after his return as a man inducted from an open shop would be. One as much as the other would need this ad-

justment period before facing the full brunt of competition for his job. I think Congress has by word and act well demonstrated its purpose to provide for equality of treatment in this respect, regardless of private contracts made by any employer with anybody.

I dissent.

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[fol. 199] United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of March, one thousand nine hundred and forty six.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

Abraham Fishgold, Plaintiff-Appellee,

v.

Sullivan Drydock & Repair Corp., Defendant; Roy Granata, etc., et al., Intervenor-Appellant

Appeal from the District Court of the United States for the Eastern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs; complaint dismissed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 200] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Abraham Fishgold v. Sullivan Drydock & Repair Corp. et al. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 4, 1946. Alexander M. Bell, Clerk.

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[fol. 201] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 202] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 1, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. The Solicitor General is requested to file a brief *amicus curiae*.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Supreme Court, U. S.
FILED
MAR 19 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

---

# No. 970

---

ABRAHAM FISHGOLD,

*Petitioner,*

*vs.*

SULLIVAN DRYDOCK & REPAIR CORPORATION, ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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KNOWLTON DURHAM,
*Counsel for Petitioner.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 970

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ABRAHAM FISHGOLD,

*Petitioner,*

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SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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The undersigned, Knowlton Durham, as attorney on behalf of the petitioner, Abraham Fishgold, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered March 4, 1946, reversing a judgment in favor of the petitioner against Sullivan Dry Dock & Repair Corporation, for the sum of eighty-six and 40/100 ($86.40) dollars, and dismissing the petitioner's complaint.

## Opinion Below

The majority and dissenting opinions in the United States Circuit Court of Appeals, Second Circuit (R. 181-195) are not yet recorded.

## Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 4, 1946 (R. 195).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925.

The jurisdiction of the United States District Court which rendered the judgment from which the appeal was taken, was conferred by Section 8 (c) of the Selective Training and Service Act of 1940, as amended. (Section 308 (c), Title 50, Appendix, U. S. Code.)

## Question Presented

Whether subdivisions (b) and (c) of Section 8 of the Selective Training and Service Act of 1940, as amended, give to a war veteran who has been stored to the position of employment occupied by him prior to his military service, after satisfactory completion of such service and discharge therefrom, the right to hold that position steadily for a period of one year, even though the displacement of a non-veteran having greater length of service in the plant of their employment will necessarily result.

## Statute Involved

The appertinent provisions are set forth in Appendix A.

## Statement

The petitioner, a welder by trade, entered the employ of the Sullivan Dry Dock & Repair Corporation on December

21, 1942, and was steadily employed as such until May 22, 1943, when he was inducted into the Army of the United States under the provisions of the Selective Training and Service Act of 1940, as amended.

On July 12, 1944, he was honorably discharged and received a certificate of satisfactory completion of his period of training and service (R. 55-57). At that time he was, and has since been, qualified as a first class welder. The Sullivan Company restored him to his former position in its employ on August 21, 1944, which was within forty days after his discharge and consequently, in compliance with the condition of subdivision (b) of Section 8 of the Act (R. 57 and Appendix).

The petitioner, although restored to his job and working at it steadily for a period of more than seven months, was laid off on several occasions and on nine separate days, viz., on April 9, April 11, and on May 17 to May 24, 1945, inclusive (R. 60, 61). On those days the employer refused to give him any work, claiming that there wasn't enough welding work available to occupy all hands. It was established that the plant was in operation on each of those days and that other non-veteran employees, possessing the same or comparable skill and experience and employed in welding work of a similar nature, were engaged at work by the employer (R. 60).

In refusing to permit petitioner to work on those days, the employer gave preference to other welders, not veterans, who had higher shop seniority than the plaintiff. This action was taken because the employer had been notified by the Union organization at that plant, that it objected to the employment of petitioner "out of his seniority position" while men of greater length of service were not put to work (R. 152). A non-veteran had been "shaped up" or "laid off", whereas petitioner had been permitted to

work (R. 70, 71, 73). This non-veteran had greater length of service, whereupon the Union protested to the employer but the employer retained petitioner at work in preference to the non-veteran, whereupon the matter was submitted to an arbitrator appointed by the National War Labor Board. The arbitrator decided in favor of the non-veteran, holding that he should not have been laid off in order to provide work for petitioner (R. 21, 74, 75).

After this decision, petitioner was laid off on the days specified and the non-veteran was taken back to work in his place. Petitioner subsequently commenced this action for compensation for loss of wages suffered by him by reason of the employer's action in laying him off from work on eleven days prior to the expiration of one year from the date of his restoration to his former position.

He also asked for a declaratory judgment that the employer be required to continue him in its steady employment for a period of one year from August 25, 1944.

The issues were tried before Judge Matthew T. Abruzzo on August 20 and 29, 1945.

A decision was rendered on August 30, 1945, in favor of the petitioner for a money judgment, based upon his loss of wages for nine days, or $86.40.

Petitioner's request for declaratory judgment, however, was denied because a year from the date of petitioner's employment had already expired and that period was the limitation of time covered by the Statute (R. 150).

The judgment was appealed from to the United States Circuit Court of Appeals for the Second Circuit, where it was argued on February 5, 1946, and a decision was rendered March 4, 1946, reversing the judgment and dismissing the complaint.

The majority opinion was written by Circuit Judge Learned Hand and Judge Harrie B. Chase wrote a dissent-

ing opinion. Judge Jerome N. Frank, the third member of the Court, concurred with Judge Hand.

## Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that Sec. 8 (b) and (c) of the Selective Training and Service Act of 1940, as amended, entitled petitioner, after being restored to his original job, to keep it for one year, unless discharged for cause, *only* if his employer had not by contract with a third party, viz., the intervenor herein, otherwise agreed.

2. In holding that Sec. 8 (b) and (c) of the Act did not require the defendant-employer to keep the petitioner at work in preference to other non-veterans having greater seniority than the petitioner, if on any day within a year of his restoration there were not sufficient jobs available for all those applying for work.

3. In holding that the trial court erred in finding as a conclusion of law, that the refusal of the defendant to employ the petitioner on nine days in April and May, 1945, constituted a discharge from his position without cause and a violation of Sec. 8(c) of the Act and that the defendant violated the provisions of the Act by not employing the petitioner on each of said days.

4. In holding that the provisions of the Act relating to seniority were not intended to restore the veteran to his former position with any gain in priority.

5. In refusing to give the interpretations of the Director of Selective Service, as expressed in Local Board Memorandum No. 190-A, the same respect and authority that is customarily given like interpretations of Statutes by other administrative officers.

6. In minimizing the weight to be given to the legislative history of Section 8 of the Act during its consideration by the Congress.

## Reasons for Granting the Writ

1. No other Appellate Court has decided the question at issue in this case. Four United States Judges have now considered it in this specific litigation. Two of them have decided it one way and two have reached a contrary decision. The decisions in the District Courts so far reported are divided. As an example we have on one side *Whirls* v. *Trail Mobile Company* (D. C. S. D. Ohio) and on the other *Olin Industries, Inc.* v. *Barnett* (D. S. C. D. Ill.).

Judge Hand, wrting for the majority below, had this to say:

> "The fact that we ourselves are not agreed, cautions us that we should not be too sure of our conclusion; and *obviously the really important matter is that the question should reach the Supreme Court as soon as possible.*" (Italics supplied—R. 190.)

The question is presently one of great public interest. The re-employment rights of hundreds of thousands of honorably discharged veterans depend to a very great degree upon the determination of this issue and an unknown number, but certainly a very great number, of employers are confused and uncertain how to rule upon the re-employment rights of their returning employees until a decision of the highest court disposes of the problem once and for all.

From the point of view of Union labor, the fact that the Local Union established in defendant's plant asked and received permission to intervene, and was the actual appellant from the judgment of the trial court, and that two

other large and important labor organizations requested and received permission to file briefs *amici curiae* upon the appeal, and that, likewise, the Attorney General of the United States asked and received permission to file a brief *amicus curiae*, shows how much importance is attached to the settlement of the issues involved.

2. Since the argument *pro and contra* are fairly and fully stated in the majority and dissenting opinions (R. 181-195) and in view of the quoted statement of Judge Hand, petitioner does not believe that it would be helpful to a decision of this application for a writ of certiorari to enter into any further or extended argument of the questions in dispute.

It is desired, however, to emphasize the importance of securing an early hearing so that the appeal, if allowed, may be argued and decided before adjournment of this term of court. The Selective Training and Service Act, itself, directs a speedy hearing. Sec. 8 (e) provides:

> "The Court (U. S. District Court) shall order a speedy hearing * * * and shall advance it on the calendar."

To expedite the trial of this case, the District Judge advanced it and placed it on the calendar of his Court for trial in midsummer when the trial Courts, except for criminal trials, were in recess.

The Circuit Court of Appeals also granted the request to advance the appeal for early argument.

It is respectfully urged that this Court, likewise, should advance the case to the earliest date available.

An additional reason for such request is that the guaranty of re-employment rights is limited by provision of Section 8 (e) of the Act to one year. That provision is to the effect that any person who is restored to a position of

employment with his previous employer "shall not be discharged from such position without cause, within one year after such restoration." For many veterans the period of one year has already expired, and within an easily estimated period, will have expired for most of the others.

## Conclusion

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

KNOWLTON DURHAM,
*Attorney for Petitioner.*

March, 1946.

# APPENDIX A

## The Selective Training and Service Act of 1940, as Amended

SECTION 1. DECLARATION OF POLICY AND INTENT OF CONGRESS.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

(b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of Selective Compulsory Military Training and Service; . . .

SEC. 8. CERTIFICATES . . .; RE-EMPLOYMENT . . .; REPLACEMENT IN INDUSTRY

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactory completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety* days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or

---

*At time plaintiff applied for re-employment, this read forty days.

the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United District attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United

States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits. • • •

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act. • • •

SEC. 10. RULES AND REGULATIONS; SELECTIVE SERVICE SYSTEM.

(a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System • • •

(3) To appoint, by and with the advice and consent of the Senate • • • a Director of Selective Service • • •.

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except Section 9) • • •.

SEC. 16. SUSPENSION OF CONFLICTING LAWS; DURATION OF ACT; * * *

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) All the provisions of this Act, except the provisions of Sections * * * 8(g) * * * shall become inoperative and cease to apply on and after May 15, 1946 * * *.

FILE COPY

Supreme Court, U. S.
FILED
APR 30 1946
CHARLES ELMORE CROPLEY
CLERK

No. 970

# In the Supreme Court of the United States

OCTOBER TERM, 1945

ARMOUR FERGUSON, PETITIONER

v.

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRIFFIN, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD, PETITIONER

*v.*

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of New York (R. 147–151) is reported in 62 F. Supp. 25. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 181–195) has not yet been reported.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 4, 1946. (R. 195). The peti-

tion for a writ of certiorari was filed on March 19, 1946, and granted on April 1, 1946. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the court below lacked jurisdiction to entertain an appeal by the Union from a money judgment in petitioner's favor against the Corporation, where the Corporation did not appeal from the judgment of the District Court.

2. Whether Section 8 of the Selective Training and Service Act of 1940 gives to a war veteran who, after satisfactory completion of military service and discharge therefrom, has been restored to the position of employment occupied by him prior to his military service, the right to hold that position steadily for a period of one year, even though the displacement of a non-veteran having greater length of service in the plant of their employment will necessarily result.

## STATUTE INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended, are set out in the Appendix, pp. 46–51.

## STATEMENT

Petitioner entered the employ of Sullivan Drydock & Repair Corporation (hereinafter called the Corporation) on December 21, 1942 (R. 168).

He worked for that company at a shipyard operated by it for the construction and repair of vessels until May 22, 1943, when he was inducted into the Army of the United States (R. 168). At the time of his induction he was employed as a welder in a position other than temporary (R. 168). After satisfactorily completing his period of Army training and service he was honorably discharged on July 12, 1944, and received a certificate to that effect (R. 57, 168). Within 40 days after his discharge, being still qualified to perform the duties of a welder, he applied for restoration to his former position and was reemployed on August 25, 1944 (R. 58, 70, 169).

As work slackened in the Corporation's shipyard, the foreman in charge of a particular project would be notified that he would not need a specified number of men on the following day. The men selected by the foreman on the basis of ability and seniority to be laid off (R. 91, 126) would customarily report the following day to the department head for re-assignment whenever work again became available, and would be reassigned on the basis of their relative seniority (R. 86). Recognition of seniority in making reassignments was required by the provisions of a collective bargaining agreement entered into in May 1944, between the Corporation and Local 13 of the Industrial Union of Marine and Ship-

building Workers of America.[1] The testimony indicated that lay-offs of this character are customary in the shipbuilding industry (R. 90–91).

Following his reemployment by the Corporation, petitioner was, on each of nine days in April

[1] Referred to herein as respondent Union or the Union.

Section 6 of Article IV of the collective bargaining agreement of May 1944, provided (R. 32): "Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor." This provision was incorporated by order of the National War Labor Board Shipbuilding Commission (R. 67).

The contract of May 1944 replaced one entered into in April 1942, prior to petitioner's employment with the respondent Corporation, which contained a substantially identical provision governing increases and decreases in working force (R. 65, 72).

Both contracts contained substantially identical clauses covering the reemployment rights of men taken into military service. The agreement of May 1944 provided:

"Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as if he were actually and continually employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the job in which he is re-employed." (R. 39, 65–66.)

and May 1945, refused work by it, although other welders, not veterans of the second World War, possessing the same or similar skill as petitioner, continued to work on those days (R. 58–64, 169–170). The denial of work to petitioner resulted from a decrease in working force coupled with the provisions of the collective bargaining agreement between the Corporation and the Union, and occurred after respondent Union had protested to the Corporation and had, pursuant to that agreement, procured an arbitrator's opinion supporting its protest, against work being given petitioner in preference to an employee senior to him in service by approximately one month (R. 13–21, 70–71, 73–77).

Thereafter, petitioner, pursuant to Section 8 (c) of the Selective Training and Service Act, commenced this action against the Corporation in the District Court of the United States for the Eastern District of New York to secure a declaratory judgment as to his right under the Act to continuous employment during the year following his restoration to his previous position after completion of his Army service and to obtain compensation for the violations of that right which had already taken place (R. 3–7). Respondent Union was permitted to intervene (R. 46–48). After hearing, the District Court held that petitioner was entitled, during the year following his return from the armed forces, to employment in

preference to all the Corporation's non-veteran employees, including those possessing greater seniority, and entered judgment for plaintiff for $86.40 for his loss of wages on the nine days in question. The court refused the declaratory judgment requested, however, because of the expiration, during the pendency of the proceeding, of the year during which plaintiff was entitled to statutory protection against discharge without cause (R. 147–151, 166–175).[2]

On appeal by respondent Union, the Circuit Court of Appeals, one judge dissenting, reversed the District Court and held that the effect of the Selective Training and Service Act was merely to restore the petitioner to the same place in the job hierarchy that he would have had if he had been on leave of absence during his period of Army service, and that there was no congressional intention to grant the veteran a "step up in seniority" (R. 184). The court interpreted the clause protecting the veteran from discharge without cause for one year as being of value only where the veteran concerned was without the protection of a collective bargaining agreement (R. 185). Judge Chase dissented on the ground that Congress intended to do something more for

[2] The District Court also held that in any event the Corporation had not sustained the burden of proving that the men given employment in preference to petitioner were all senior in service to him (R. 150–151). The Circuit Court of Appeals, however, treated this fact as proved (R. 183).

veterans than give them "the right to have their time in the armed forces counted as time worked for their old employers as they competed with others not displaced by the statute for their old jobs, or ones as good, according to whatever standards of competition their employers and some third party by contract saw fit to impose upon them" (R. 191–192). In the opinion of Judge Chase, petitioner was entitled under the Act to "an actual job with actual pay" for a year after his return from the Army (R. 192).

This Court, when granting certiorari, requested the Solicitor General to file a brief *amicus curiae*. Thereafter, however, petitioner requested the law officers of the Government to represent him, pursuant to Section 8 (c) of the Selective Training and Service Act. The present brief, therefore, is, in accordance with the statutory mandate, filed on behalf of petitioner.

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that Sec. 8 (b) and (c) of the Selective Training and Service Act of 1940, as amended, entitled petitioner, after being restored to his original job, to keep it for one year, unless discharged for cause, *only* if his employer had not by contract with a third party, viz., the intervener herein, otherwise agreed.

2. In holding that Sec. 8 (b) and (c) of the Act did not require the defendant-employer to

keep the petitioner at work in preference to other non-veterans having greater seniority than the petitioner, if on any day within a year of his restoration there were not sufficient jobs available for all those applying for work.

3. In holding that the trial court erred in finding as a conclusion of law, that the refusal of the defendant to employ the petitioner on nine days in April and May, 1945, constituted a discharge from his position without cause and a violation of Section 8 (c) of the Act and that the defendant violated the provisions of the Act by not employing the petitioner on each of said days.

4. In holding that the provisions of the Act relating to seniority were not intended to restore the veteran to his former position with any gain in priority.

5. In refusing to give the interpretation of the Director of Selective Service, as expressed in Local Board Memorandum No. 190–A, the same respect and authority that is customarily given like interpretations of statutes by other administrative officers.

6. In minimizing the weight to be given to the legislative history of Section 8 of the Act during its consideration by the Congress.

## SUMMARY OF ARGUMENT

Upon petitioner's return from the Army, the Corporation restored him to his position as a welder without loss of seniority. Thereafter, pur-

suant to a contract between the Corporation and respondent Union, petitioner was denied employment on each of nine days, while other welders, non-veterans, continued to work. Petitioner then brought this suit against the Corporation in the District Court, seeking wages for the days on which he had been unemployed and a declaratory judgment as to his rights under the Selective Training and Service Act. Respondent Union was permitted to intervene. The District Court held for petitioner and entered a money judgment in his favor against the Corporation. It did not issue a declaratory judgment as prayed by petitioner. The Corporation took no appeal. Respondent Union, however, appealed and obtained a reversal of the District Court's judgment and dismissal of the complaint.

1. It would appear that the court below lacked jurisdiction to entertain the appeal since respondent Union did not have a sufficient interest in the proceeding to support an appeal from the District Court's judgment. In our view our duty as statutory counsel for the petitioning veteran and as officers of this Court requires that we invite attention to the fact that respondent Union's rights were not affected by the judgment except to the extent that it constituted a precedent adverse to the Union. Such an interest, however, did not give respondent Union sufficient standing to appeal. *Boston Tow Boat Co. v. United States*, 321 U. S. 632. Moreover, after the expiration of the statu-

tory year, no case or controversy between petitioner and respondent Union existed, since at that time petitioner had no future rights under the Act insofar as the matters litigated were concerned.

II. Aside from the question whether the case was properly before the court below, that court erred in its construction of the Selective Training and Service Act. It held that the Act does not entitle veterans of the armed services to a year's full employment, despite the provision in Section 8 (c) that they may not be discharged without cause for one year after restoration to their jobs, if their discharge within that time takes place pursuant to a collective bargaining agreement. The court below failed to construe the Act liberally "to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." See *Boone v. Lightner,* 319 U. S. 561, 575.

The language of the Act is clear. It provides not only for the restoration of the veteran to his former position without loss of seniority, but also that he may not be discharged without cause for one year after such restoration. It makes no distinction between union members and non-members. It ascribes no more meaning to the no-discharge clause in the absence of a collective bargaining agreement than where such an agreement governs the veteran's working conditions. It contains no indication that the provisions of Section 8 were intended by Congress to be sub-

ordinate to any agreement, custom, or established personnel practice. Nor is such indication to be found in the Act's legislative history. On the contrary, Congress, in reenacting the Act, after the Director of Selective Service had interpreted it as requiring reinstatement of a veteran regardless of whether his reinstatement necessitated the discharge of a non-veteran with greater seniority, approved such interpretation and indicated its intention to give full meaning to each clause, including the no-discharge clause, of Section 8, and to assure veterans of work for one year after their discharge from the service.

## ARGUMENT

### I. THE COURT BELOW LACKED JURISDICTION TO ENTERTAIN AN APPEAL BY THE UNION FROM A MONEY JUDGMENT IN PETITIONER'S FAVOR AGAINST THE CORPORATION

Originally the United States appeared in this case only as *amicus curiae*, to present its views as to the substantive question involved. The petition for certiorari herein was filed by private counsel on behalf of petitioner, and likewise raised only substantive questions. It was only after the preparation of this brief was undertaken by the law officers of the United States on behalf of petitioner, pursuant to Section 8 (e) of the Selective Training and Service Act, that the jurisdictional defect about to be discussed became apparent.

The judgment in the District Court awarded petitioner money damages only against the Corporation. The Corporation did not appeal from that judgment. No relief was granted against the respondent Union, which had only asked dismissal of the complaint. Since legally the judgment did not adversely affect the Union, it had no sufficient interest to support an appeal. It appears, therefore, that the court below was without jurisdiction to entertain the appeal. Moreover, since the statutory year had expired prior to entry of the District Court's judgment, there was no longer any controversy between petitioner and the Union, so that as between them the case was moot.[3]

A. *Respondent Union did not have sufficient interest as an intervener in the District Court to support an appeal from the judgment entered therein.*

Fishgold brought suit against the Corporation in the District Court for a declaratory judgment as to his rights under the Act to continuous employment during the year following his restora-

[3] In *United States* v. *Johnson*, subsequently reported in 319 U. S. 302, this Court entered an order on April 5, 1943 (Journal of the Supreme Court, Oct. T., 1942, p. 195), postponing a decision on jurisdiction until the hearing on the merits, and specifically directed counsel to discuss "* * * (3) whether any case or controversy exists reviewable in this Court, in the absence of an appeal by the party plaintiff defeated in the District Court: * * *". That question was not decided, because pending the hearing the plaintiff filed an appeal which was allowed. Brief for the United States, No. 810, Oct. T., 1942, p. 2.

tion to his previous position and also to obtain money damages as compensation for the violations of that right which had already taken place. The asserted violations consisted of refusing him employment on nine different days, on which days a non-veteran, who presumably had greater seniority than Fishgold, was employed. The local shipbuilding union was permitted to intervene and filed an answer asking that Fishgold's complaint be dismissed. (R. 22–26, 47–48). The District Court entered a money judgment in favor of Fishgold and against the defendant Corporation in the amount of $86.40 (R. 174–175). It declined to grant a declaratory judgment on the ground that the money judgment sufficed in this particular case (R. 150). The Corporation took no appeal from this judgment. The intervening Union filed a notice of appeal from the judgment and served notices of appeal upon counsel for Fishgold and upon counsel for the Corporation (R. 176–177).

It seems clear that in view of the nature of the judgment entered by the District Court the respondent Union had no appealable interest, since the Union was not adversely affected by the judgment entered against the Corporation. No judgment of any kind was entered against the Union. Neither it nor its members were called upon to pay any money or to refund any money as a result of the decision. Fishgold has no future rights under the judgment nor was he granted

any relief against the Union. At the most the District Court entered a judgment which might constitute an unfavorable legal precedent in other cases insofar as the Union's right to enforce the terms of its contract despite the Selective Service Act is concerned. But a party cannot appeal from an abstract legal ruling in the absence of a legal right which is violated. *Boston Tow Boat Co.* v. *United States,* 321 U. S. 632.

It may be accepted as settled law that where intervention has been permitted the intervener may appeal from any judgment or decree which affects his legal interests. 10 Cyc. Fed. Proc., sec. 5006; Moore, *Federal Practice,* sec. 24.11, p. 2371. Typical examples of situations in which the intervener has been held to have sufficient standing to appeal are where intervention was for the purpose of asserting a tax claim against property being foreclosed, *Savannah* v. *Jesup,* 106 U. S. 563; where an injunction was issued against interveners, *Idaho Irrigation Co.* v. *Gooding,* 285 Fed. 453 (C. C. A. 9), affirmed, 265 U. S. 518; where the intervener asserted a right in defendant's property superior to that of plaintiff, *United States* v. *Northwestern Development Co.,* 203 Fed. 960 (C. C. A. 9); and where the intervener asserted title to certain property and asked for an order directing delivery of the property to it, *Dexter Horton National Bank* v. *Hawkins,* 190 Fed. 924 (C. C. A. 9). In these cases the intervener had

a personal or property right directly affected by the judgment from which he appealed. However, unless the intervener's rights are affected by the judgment, he may not appeal and a pre-existing right sufficient to support intervention is not sufficient to support an appeal unless that right is affected by the judgment. See *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 Fed. 494, 499 (C. C. A. 9).

An exception to the foregoing is that where a public official or public body charged with the enforcement or protection of a public right intervenes to assert or protect that right, he may appeal from an adverse judgment because of the adverse effect of the lower court's opinion on the interests of the public. *Securities & Exchange Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 458–460; cf. *Pennsylvania* v. *Williams*, 294 U. S. 176; see Section 1 of the Act of August 24, 1937, c. 754, 50 Stat. 751, 28 U. S. C. 401. Since there is no suggestion in the present record that the Union appeared in any capacity other than a private one, in defense of its own contract, we need not consider whether, in other cases, a local labor union sufficiently represents the public interest to appeal as in the decisions cited.

But the present case does not turn on the peculiarities of intervention. It may be conceded that, once intervention is permitted, an intervener is a party for all purposes. This circumstance, how-

ever, is not decisive of the right to appeal. For if petitioner had sought money damages from the Corporation and the respondent Union, in an action against both of them, and had recovered a money judgment only against the Corporation, it is clear that the respondent Union would have lacked standing to appeal.

The situation here is similar. The judgment has not affected any substantive right of the respondent Union. At most, respondent Union had an interest in the outcome of the litigation between petitioner and the Corporation. But, as this court pointed out in *Boston Tow Boat Co.* v. *United States,* 321 U. S. 632, 633, the mere fact that the outcome of litigation "might establish a precedent" adverse to the intervener is not sufficient to support an appeal by the intervener. See also *Chicago* v. *Chicago Rapid Transit Co.,* 284 U. S. 577, 578; *Alexander Sprunt & Son* v. *United States,* 281 U. S. 249, 255; *International Brotherhood* v. *Keystone Freight Lines,* 123 F. 2d 326 (C. C. A. 10).

Since, therefore, the respondent Union lacked sufficient standing to appeal from the money judgment against the Corporation, that judgment was not properly before the court below. It follows that the failure of that court to dismiss the appeal on its own motion was jurisdictional.

B. *Any controversy between petitioner and the respondent Union became moot after the expiration of the year following petitioner's reemployment*

Petitfoner made no claim below to any right to reemployment or preference or seniority after the expiration of the statutory year. Reinstatement of the judgment for $86.40 will make him whole financially; that plus the employment he had during the remainder of the year afforded him everything which he sought, particularly since his prayer for declaratory judgment related only to one year's employment (R. 7). But his only claim against the Union was that involved in the prayer for a declaratory judgment, assuming as we must that that prayer ran against the intervener once intervention was allowed.

The Union itself sought no declaratory judgment. And, in any event, after the expiration of the statutory year there was nothing against which the judgment prayed for could operate. It was for this reason, among others, that the district court refused to grant a declaratory judgment (R. 150). As between petitioner and respondent, the dispute was moot, and no case or controversy existed.

The money judgment against the Corporation adjudicated no rights as between petitioner and

respondent, and did not adversely affect respondent Union. Petitioner's year of guaranteed employment had passed, and he had no future rights under the Act. He sued as an individual and not in any representative capacity. The Union is consequently free to relitigate the substantive question with any veteran who may hereafter contend that he is entitled to a year of complete and full reemployment notwithstanding the provisions of the union contract which call for employment on the basis of seniority. True, the reasoning of the district court's opinion (R. 147–151) is adverse to the Union's contentions, but mere propositions of law do not amount to a case or controversy within the meaning of Article III of the Constitution. The federal courts do not sit to give advisory opinions to determine abstract questions of law where no real or substantial controversy exists between those who appear as adverse parties to the suit. *Boston Tow Boat Co. v. United States,* 321 U. S. 632; *Coffman* v. *Breeze Corporations,* 323 U. S. 316, 324–325, and cases cited; see also Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States,* pp. 414–415, 432–435.

We are therefore of the opinion that, since the respondent Union had no standing to appeal the money judgment against another party to the proceeding, and since there is now no case or controversy between respondent Union and petitioner, the judgment below should be reversed

and the cause remanded to the Circuit Court of Appeals with directions to dismiss the Union's appeal for want of jurisdiction and to reinstate the judgment of the District Court.

* * * * *

We have argued the foregoing points because as statutory counsel for petitioner we feel bound to obtain for him the money damages which will make him financially whole and which will give him the benefits to which we believe he is entitled under the Act of Congress involved. Our duty as officers of this Court would have required us in any event to point out what appears to us to be a plain defect of jurisdiction.

We are aware, of course, of the public interest in an early resolution of the substantive question involved, which affects or may affect the rights of large numbers of ex-service men, of many unions, and of the many employers who have entered into collective bargaining agreements similar to the one here in question. We are in consequence anxious to have this Court decide the case on the merits if it has jurisdiction to do so.

II. THE COURT BELOW ERRONEOUSLY INTERPRETED THE SELECTIVE TRAINING AND SERVICE ACT AS PERMITTING THE CORPORATION TO DENY A VETERAN FULL EMPLOYMENT WITH FULL PAY DURING THE STATUTORY YEAR

The Selective Training and Service Act of 1940 was enacted by Congress at a time when it was becoming increasingly clear that the effective de-

fense of this country in a world at war required the training of the manpower of the nation to meet any emergency which might arise. While, at the time of its enactment in September 1940 it was still hoped that the United States might avoid participation in the war, it was recognized that the possibility of war was great. That was why the Army was being expanded. Congress recognized that the young men called to serve in the armed forces of their country would be subjected to hardships, in particular, to the immediate hardship of being required to leave their jobs and, unless some provision were made therefor, to have no jobs to which to return. It was in order to cushion the impact of those economic hardships that Congress passed Section 8 of the Act.

It is paragraphs (b) and (c) of that section that are here involved. Section 8 (b) as amended provides in substance that any person inducted into the armed forces who completes his training and service therein and receives a certificate to that effect, who left "a position, other than a temporary position," in order to go into the armed forces and who "is still qualified to perform the duties of such position," and who makes application for reemployment within 90 days[4] after he is relieved from training and service, shall be restored by

[4] At the time petitioner applied for reemployment, application for reemployment was required within 40 days.

the employer in whose employ he was "to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so".

Section 8 (c) provides that any person so "restored" "shall be considered as having been on furlough or leave of absence" while in the armed forces, "shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such service, and shall not be discharged from such position without cause within one year after such restoration."

The question presented requires the determination of the congressional intention in enacting Section 8 (b) and (c). Such intention must be determined not only in view of the considerations in the congressional mind at the time it enacted the Selective Training and Service Act in 1940, but also its intent when it re-enacted the statute in 1945: The necessity for building a vast army of trained men; the necessity, in so doing, for calling upon the entire citizenry; and the necessity for mitigating, to the extent possible, the sacrifice demanded of those selected for training and service, th latter necessary not only from the stand-

point of the men themselves but also from the standpoint of building an army of sound morale which would thereby better be able to defend the country in time of need. See 86 Cong. Rec. 10573. In view of these considerations, the Act must be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation". See *Boone* v. *Lightner*, 319 U. S. 561, 575. See also *Trailmobile Co.* v. *Whirls*, C. C. A. 6, decided April 5, 1946, C. C. H. Labor Law Ser., Par. 63,080.

A. *Section 8 (b) and (c) clearly require restoration of the veteran to, and his retention for one year in, actual employment regardless of his seniority if the work he previously performed is still being done*

Petitioner, upon completing his Army service and making due application for reemployment by the Corporation, was restored to his position as a welder as required by Section 8 (b) of the Act. Thereafter, within one year after his restoration, petitioner was refused employment by the Corporation on each of nine days on which, because of lack of work, it reduced the number of welders in its employ. This reduction was effected in accordance with a collective bargaining agreement between the Corporation and respondent Union, pursuant to which the Corporation was required, in substance, to lay off junior employees before senior employees. See *supra*, pp. 3–5. None of the

welders who continued to work for the Corporation when petitioner was denied employment was a veteran of World War II.

The refusal of the Corporation to employ petitioner on each of these nine days constituted a discharge of petitioner without cause within the meaning of Section 8 (c) of the Selective Training and Service Act of 1940. Since it occurred within one year after petitioner's restoration to the position he had held prior to his induction, it was a violation of the Act, and petitioner was entitled to recover the wages he lost thereby. As long as welding work was being performed for the Corporation, the Selective Training and Service Act required it to prefer petitioner to all others (except other veterans of World War II) for such work for a year after his return, regardless of collective bargaining agreement, custom, or other established practice to the contrary, purporting to entitle others to preference over petitioner. In brief, under the Act, service in the armed forces must, for one year, be given more weight than seniority, ability, or any of the other criteria which an employer might otherwise use in determining who is to be discharged when decreases in working force become necessary.

This right of petitioner to employment for the year following his return does not, as the court below indicated it must (R. 184), rest upon any claim that the Act requires any improvement in

his seniority position, but upon the provisions of the Act which, in addition to protecting the veteran from "loss of seniority" due to his service in the Army, give him an unconditional right to be retained in his job for a year following his return unless discharged for cause.

The Act is clear. Section 8 (b) requires that the veteran be restored to his job. Section 8 (c) defines what he is entitled to in addition to mere restoration: (1) to "be considered as having been on furlough or leave of absence" while in the armed forces, (2) to be "restored without loss of seniority", (3) "to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time" of induction into the armed forces, and (4) not to be "discharged from such position without cause within one year after such restoration." Having been restored to his position without loss of seniority, petitioner does not claim that he was entitled to any greater seniority than he was recognized by the Corporation as having. That was petitioner's seniority for all purposes. But it could not control when he should be laid off until after one year had elapsed from his restoration to his position. During that year, petitioner was entitled to employment whether he had great or little seniority status. This did not result from a "step-up" in petitioner's seniority (cf. R.

184); it did not result from his having "super-seniority"; it resulted from the fact that Congress has specifically provided, in Section 8 (c), that in addition to all other rights which petitioner, as a reemployed veteran, had in his job, he had the right to be employed for one year so long as there was work to be done. If lay-offs in the Corporation's plant are made on a seniority basis, petitioner's seniority governs when he shall be laid off only after the expiration of the year's employment which Section 8 guaranteed him.

Respondent Union contended below that the right not to be discharged without cause for one year did not protect petitioner against temporary loss of work. But giving the language of the Act its plain meaning, it is clear that any denial to petitioner of work during the year following his return from the Army, unless for cause, violated its provisions, no matter what such denial is called, whether it took the form of a permanent discharge or lay-off. While in other situations and for other purposes a lay-off may be differentiated from a permanent discharge, in the framework of Section 8 of the Act any distinction between the two is not only irrelevant but also defeats the purpose of the Act to give the veteran a year's time in which to re-acquire his lost skills and resume his place in the competitive world. This purpose can be accomplished only by recognizing that the right of the veteran is a right to work, not the right to a place on a

waiting list, and that any personnel practice of an employer, whether or not founded on a contract or other private undertaking or agreement, which denies work to the veteran within a year of his restoration and relegates him to a waiting list, denies him the right to work guaranteed by Section 8 (c)[5] From this standpoint also, it is as much a denial of work to the veteran under Section 8 (c) to deny him work for one day or for nine days, as in petitioner's case, as it is to deny him work for nine months. Cf. *Droste* v. *Nash-Kelvinator Corporation, et al.* decided Jan. 30, 1946 (E. D., Mich.), C. C. H. Labor Law Ser., Par. 62,947.

Respondent Union contends and the Court below held that where petitioner was denied work during the year following his return from the

[5] See Judge Chase's dissent (R. 193):

"Congress was here prohibiting not merely discharge from employment but discharge from 'such position.' It did not leave the employer free to 'lay-off' the reemployed veteran at will, or to shift him from one position to another not as good, or otherwise deprive him of the particular kind of work and pay to which he had been 'restored.' It gave the veteran a year of security in this position before he could be ousted from it simply because someone had a contract with the employer which, but for the statute, gave him a senior right to it. To deny the veteran the right to work in that position during the year is a 'discharge' from it for the period of his deprivation and calling such action a 'lay-off' or anything else one may choose for a name neither alters the fact nor justifies the action. Such a choice of labels is simply what should be recognized as a futile attempt to circumvent the statute."

service because of the fact that reductions based on seniority were made in his employer's working force, his rights under the Act were not violated if he had been restored to his position "without loss of seniority"; that having been so restored, he received all the benefits that Congress in enacting Section 8 (b) and (c) intended that he should have.[6]

This construction, however, gives no meaning to the provision in Section 8 (c) that a veteran such as petitioner who has been restored to his position without loss of seniority "shall not be discharged from such position without cause within one year after such restoration". A mere reading of Section 8 (b) and (c) makes it clear that that clause gives the reemployed veteran something additional to the other rights given him by that section—one year's employment from the time of restoration to his position.

This additional right clearly cannot be deemed to be cut down or limited by the petitioner's separate and independent right to have the time he spent in the Army credited toward his seniority. Petitioner does not deny that, as the court below held, the Act did not grant any step-up in senior-

[6] Two other courts have given the same treatment to the problem and come to the same conclusion. *Droste* v. *Nash-Kelvinator Corp., et al.*, decided January 30, 1946 (E. D. Mich.), C. C. H. Labor Law Ser., Par. 62,947. *Olin Industries* v. *Barnett, et al.*, decided January 24, 1946 (S. D. Ill.), C. C. H. Labor Law Ser., Par. 62,935. But cf. *Trailmobile Co.* v. *Whirls* (C. C. A. 6), *supra*.

ity (R. 184). The issue in this case is not whether petitioner returned from the service with a "step-up" in seniority but whether the seniority rights of others, entitling them either by custom or agreement to preference over him for employment, could limit the right to employment for a year given him by the Act. The court below held that it could be so limited. As stated by the dissenting judge below (R. 191), the majority held that the right to employment for a year given the veteran by the Act entitles him to employment "only if his employer has not by contract with a third party otherwise agreed"—in brief, that where the employer has agreed to give more weight to seniority than to service in the armed forces in making reductions in his personnel, the private agreement and not the Act of Congress controls.

But the assumption that the veteran's right to employment for a year can have any limitations placed on it other than those expressed in the Act and that the employer may cut it down or abridge it by engaging in personnel practices founded in contract runs counter to both the letter and spirit of the Act. If the veteran's right to employment for a year can be subordinated by virtue of a collective bargaining agreement to the rights of non-veterans senior to him in the company's employ, the protection accorded the veteran by the Act is largely illusory. If such an agreement can make seniority more significant than service in the

armed forces in determining a veteran's right to employment as against a non-veteran, it can do the same for other factors in the employment relationship, such as union membership or relative ability. Moreover, if rights under the Act can be limited by union agreement, no reason appears, despite the contrary implication below, why they cannot be limited by an employer's self-imposed personnel practices. For there is nowhere to be found in the Selective Training and Service Act any indication that veterans are to be treated differently, depending upon whether or not they are covered by collective bargaining agreements; that only those not so covered are entitled to the full protection of the Act, while others are afforded only such protection as the union's collective bargaining efforts may obtain for them, whether greater or less than that afforded by the Act. Compare R. 185. On the contrary, all the indications are that the Act declares a congressional reemployment policy, applicable alike to all veterans, regardless of the existence of a collective bargaining relationship or other private arrangement between a union and their employer.

Since, therefore, there is no basis for distinguishing between employment practices based on a collective bargaining agreement and those not so based, the result of the decision below is to subject the veteran to the usual hazards of employment. A veteran would thus be no better

protected against an employer's established practice of preferring local employees to transients, married men to bachelors, women to men, than the court below held he is protected against the practice of preferring senior to junior employees.[7] All the Act does for him, as interpreted below, is to assure him that his military service will not count against him and that he will nof be penalized for the time he spent in the service of his country.

Clearly such negative assistance was not what Congress intended. The Act was designed to afford an affirmative benefit to the veterans. It was drawn so as to assure him of a year's employment in which to regain his lost skills and reestablish himself economically, and to protect him against discrimination in any of the incidents of his employment relationship as a result of his service in the armed forces. *Kay* v. *General Cable Corp.*, 144 F. (2) 653, 654 (C. C. A. 3); *MacMillan* v. *Montecito Country Club, Inc.*, decided March 29, 1946 (S. D. Cal.), C. C. H. Labor Law Ser., Par. 63,054.

Each of the rights conferred on veterans by Section 8 (c) is a "separate, distinct and independent benefit". See *Trailmobile Company* v. *Whirls*, C. C. A. 6, decided April 5, 1946. Each

[7] While seniority systems are common in industry, the Act contains no indication that commonly accepted practices take precedence over the clear provisions of Section 8 (b) and (c) where they conflict with those provisions.

differs slightly from the others. Only the no-discharge provision is limited to a year's duration. To say, as did the court below, that petitioner could be laid off within one year of restoration to his position without loss of seniority, so long as he was laid off in accordance with the seniority system observed by respondents, gives effect only to those provisions of Section 8 of the Act which require job restoration without loss of seniority. It gives no effect to the prohibition in Section 8 (c) against discharging the restored veteran within one year of restoration. It fails to recognize the congressional intent to assure each member of the armed forces and each prospective member that for one year after restoration to his job he would, without regard to seniority and with regard only to the availability of work, be afforded employment, an opportunity to reacquire skills lost during his period of service, a chance to reestablish himself on a sound economic basis as a member of the community. This right which the Act gives the veteran is in addition to, and independent of, the separate and distinct right given him to be restored without loss of seniority. One right does not impair or limit the other. Both are of value. After the veteran's statutory right to employment for a year has expired, reliance on his seniority position may be necessary to assure his right to work. Cf. *Trailmobile Co.*

v. *Whirls, supra.* But until that year has elapsed, he cannot be denied employment because of that seniority position.

The decision below thus invokes one of the rights given the veteran by the Act, the right to be restored without loss of seniority, to cut down the main grant, the right to employment for a year. But the Act permits discharge within the year only "for cause" and respondents have never contended that any "cause" existed for petitioner's discharge other than the provisions of a collective bargaining agreement entered into subsequent to the enactment of the Act. Clearly, neither the Corporation's contractual arrangements nor other personnel practices can override the statutory purpose and direction or serve as "cause" to justify petitioner's layoff. The court below, while recognizing "the claims of those who stood by the nation in the hour of its need" (R. 190–191), concluded that the language of the Act compelled an interpretation giving them what "may appear an altogether inadequate equivalent for their services" (R. 186). The contrary is true. It is only by ignoring the unequivocal language protecting the veteran from discharge without cause for a year and by grafting on his right to employment limitations *dehors* the language of the Act that the court below was able to reach the erroneous result it did.

B. *The legislative history of the Selective Training and Service Act of 1940 supports the view that petitioner was entitled to one year's employment regardless of his seniority.*

The legislative history of the Act does not disclose any congressional intention inconsistent with the statute's language. It furnishes no evidence of a congressional intent merely to restore veterans to their jobs without loss of seniority; to protect veterans in their jobs for one year after restoration only if they are not covered by collective bargaining agreements and leave others to seek their protection in such agreements; or to give a minimal meaning only to the no-discharge clause in Section 8 (c). On the contrary, recourse to the legislative history reinforces the conclusion derived from the language of the Act: that its purpose is, primarily, to secure the veteran's right for a year to work at the job he left in order to enter the armed forces and, secondarily, to assure him that whatever rights or privileges he had at such employment would not be prejudiced by reason of his service in the armed forces.

The Selective Training and Service Act as originally introduced contained no provision for the reemployment of servicemen on their release from service. S. 4164 and H. R. 10132, 76th Cong., 3rd Sess. Such a provision was first incorporated into the bill while it was being considered in committee.

The first draft of the bill prepared by the Senate Military Affairs Committee expressed it to be merely "the purpose and intent of Congress that every man who is called from a job * * * ought to be reemployed in such job or an equally good one without loss of seniority * * *." Committee Print No. 1, July 23, 1940. In the fourth committee draft, reemployment was directed to be "without loss of seniority or benefits or insurance participation or benefits." Committee Print No. 4, July 27, 1940. In this draft, also, the rights of the veteran on restoration (Section 8 (c)) were made the subject of a separate paragraph from that directing his reemployment (Section 8 (b)). Most significant of all, however, was the change from precatory to mandatory language and, with such change, the appearance for the first time of the provision against discharge without cause for a year. Clearly, now that the bill was no longer hortatory only, Congress was concerned with placing a time limit on certain of the privileges and obligations it created.* In the sixth draft, a remedy in the

* It is significant that although it was pointed out to the House Committee on Military Affairs in a memorandum submitted by the National Association of Manufacturers (Hearing before House Committee on Military Affairs on H. R. 10132, 76th Cong., 3d Sess., p. 633) that the reemployment provisions, as drafted, would require dismissal of a non-veteran with greater seniority in order to retain the veteran, no change was made in the language of these provisions by the Committee.

courts for the enforcement of the restoration provisions was added. (Section 8 (e)), Committee Print No. 6, August 1, 1940.

Throughout the evolution of Section 8 in committee, from a simple expression of intention to a command backed by effective sanctions, its purpose continued to be that "every man called from a job" should be "reemployed in such job." It was so described in the committee report which speaks of these provisions as declaring the purpose and intent of Congress "That every man who leaves his job to participate in this training and service should be reemployed without loss of seniority or other benefits upon his return to civil life." S. Rep. 2002, 76th Cong., 3rd Sess., p. 8.

Chairman Sheppard of the Senate Military Affairs Committee used similar language in describing identical provisions in the National Guard Act, saying that "it was the sense of the Senate Military Affairs Committee that an effort should be made to restore persons ordered into service to their former employment at the end of their training or to employment of similar pay and status." 86 Cong. Rec. 9836.

Senator Thomas, another member of the Senate Military Affairs Committee, referred to Section 8 as "the attempt of the committee to make secure persons' jobs after the year's service." 86 Cong. Rec. 10572. Almost identical language was used by Representative Celler in explaining the com-

panion House Bill. Under it, he said, "All those who serve shall have the right to claim return to their jobs." 86 Cong. Rec. 11435.

A similar understanding that the direction to restore the veteran to his previous position meant to his previous job or employment is reflected in the comments of almost every Congressman who discussed the question.[9] They described the provision variously as directing the employer to "rehire" (86 Cong. Rec., 10107); as a provision to "conscript" the servicemen's "jobs" (86 Cong. Rec. 10487); and as securing "reemployment" (86 Cong. Rec. 11697).

As these various statements show, the portions of the bill which became Section 8 of the Act were regarded as dealing primarily with employment. The veteran was to be restored for a year to the job from which he had been inducted. Language appropriate to accomplish this purpose was employed. The employer was directed to restore the veteran to the position he left. And by "position" was meant an actual employment relationship and not merely status or a contingent right

[9] Common agreement upon the general purpose of an act may be shown by reference to the congressional debates therein (*United States* v. *San Francisco*, 310 U. S. 16, 22), although ordinarily, of course, isolated statements made by an individual member of Congress during debates are not entitled to weight in determining the construction put upon the language by that body. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 318; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 474.

to employment. So "position" is referred to in the Act as a "position * * * in the *employ* of any employer" (Sec. 8 (b)). The veteran obtains it back by making "application for *reemployment*" (*ibid*). He may not claim it, however, unless he is "still qualified to *perform* the duties of such position" (*ibid*). If the position he left is unavailable, he must be given a "position of like seniority, status, and *pay*." *Ibid*. [Italics added.]

Congress, having thus assured the veteran of return to his previous employment, was also concerned, however, that he should not upon his return be prejudiced in whatever rights and privileges he had gained as a result of working, and to this end inserted specific provisions in the Act. The veteran was to be guaranteed first, restoration to his previous employment; second, retention therein for at least one year; and third, protection in other incidents of his employment, including his seniority position.

As the bill emerged from the Senate committee it reflected these various purposes. In addition to directing the restoration of the veteran to his own position or to one of "like status and pay", and prohibiting his discharge without cause within one year after his restoration, it provided that such restoration should be without "loss of seniority, insurance participation or benefits, or other

benefits". S. Rep. No. 2002, 76th Cong., 3d Sess., p. 4.

It was feared, however, that these directions were not sufficiently explicit and amendments were introduced designed to strengthen the protection given the returning servicemen. With this end in view the House Military Affairs Committee insisted on the insertion of the word "seniority" before the words "status and pay" in the description of the position to which the veteran was to be restored in the event that the one he left was not available.[10] The purpose of the change as described by the House Managers after the change had been agreed upon in conference was to provide for preserving the seniority of returning servicemen as well as their status and pay. H. Rep. No. 2874, 76th Cong., 3d Sess., p. 5. Its purpose was similarly described by Representative May (86 Cong. Rec. 10761):

> You will find that in amendments numbered 12, 13, and 14 the House inserted the word "seniority" relating to a position held by the guardsman. It is inserted in three places, and provides that he shall be restored to his seniority status. In other words, if a man is a Civil Service employee in the Government of the United

[10] This change was made first in the National Guard Act, 54 Stat. 858 (50 U. S. C. App. § 401 *et seq.*), which was under consideration simultaneously with the Selective Training and Service Act, and was then incorporated without further consideration into the latter.

> States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position.

Subsection (c) was also amended in order to ensure that the seniority rights of inducted men were adequately protected. It was changed to read as follows, the italicized portions indicating the added and amended language (86 Cong. Rec. 10914, 11702):

> Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered during the period of service in such forces as on furlough or leave of absence;* and shall be so restored without loss of seniority; and *shall be entitled to participate in* insurance or other benefits *offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time of being inducted into such forces,* and shall not be discharged from such position without cause within 1 year after such restoration.

The purpose of this change was explained by Representative May, speaking for the House

Committee on Military Affairs which proposed the amendment, as follows (86 Cong. Rec. 11702):

> I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement.

Senator Sheppard, who spoke for the amendment in the Senate, likewise indicated that the change was intended to give additional protection to the veteran. He said:

> That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me to be a good suggestion. (86 Cong. Rec. 10914.)

As these statements plainly show, the provisions of section 8 (c) referring to seniority were intended to add to and not cut down the right of the veteran to a job on his return from the armed forces,—to increase the protection the Act gave servicemen on their return. They, therefore, cannot be used as limiting or derogating from the veteran's right to reemployment.

III. CONGRESS, IN REENACTING THE SELECTIVE TRAINING AND SERVICE ACT, APPROVED THE ADMINISTRATIVE INTERPRETATION THAT A VETERAN IS ENTITLED TO HIS JOB REGARDLESS OF HIS SENIORITY

The Director of Selective Service is charged with establishing a Personnel Division to aid former members of the armed forces in securing reinstatement in their positions. Section 8 (g). By Executive Order 8545, dated September 23, 1940 (5 F. R. 3779), he was authorized to administer the Act and "to issue such public notices, orders, and instructions as shall be necessary to the efficient administration of the selective service law * * *". Pursuant to such authority, the Director, on May 20, 1944, issued Local Board Memorandum 190–A, interpreting the Act to require reinstatement of a veteran to "his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority." Part IV, Section 1 (c).[16] While the Director's judgment as to the meaning of Section 8 may not be controlling, it is that of an informed

[16] Local Board Memorandum 190–A was issued for the instruction and guidance of the Local Boards and reemployment committeemen, in connection with the performance of their function under Section 8 (g) of the Act of rendering assistance to veterans seeking replacement in their former positions. The principles which it enunciated have since been incorporated into Part III of a Handbook published by the Selective Service System which, as stated in its introduction, "presents the official statement of policy, operating procedure, and interpretation of the Veterans Assistance Program of the Selective Service System."

administrative official entrusted with the duty of administering the Act and may properly be resorted to for guidance. Cf. *Skidmore* v. *Swift & Co.*, 323 U. S. 134.

The foregoing interpretation of the Director was specifically called to the attention of a special sub-committee of the House Committee on Military Affairs on September 12, 1944, in the course of testimony by Colonel Keesling, the chief liaison and legislative officer of the Selective Service System. Report of Hearings before a Special Subcommittee of Committee on Military Affairs of the House of Representatives, 78th Cong., 2nd Sess., September 12, 1944, pp. 8–9. Six days later, a bill (H. R. 5386, 78th Cong., 2nd Sess.) was introduced, 90 Cong. Rec. 7863, enlarging the time within which veterans might apply for reemployment. In the Congressional consideration of that bill, which became the Act of December 8, 1944, c. 548, 58 Stat. 798, no attempt was made to alter other language of Section 8 so as to overrule the interpretation given it by the Director of Selective Service in Local Board Memorandum 190–A. Cf. *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 474.

Moreover, that interpretation was brought to the attention of the Senate Committee on Military Affairs prior to the reenactment without change of the Act.[12] Yet less than two months later,

[12] Hearings before Senate Committee on Military Affairs on S. 36 and H. R. 1752, 79th Cong., 1st Sess., p. 214.

Further evidence that Congress itself considered the Selective Training and Service Act to do more than return the

Senator Thomas, as Chairman of the Senate Committee on Military Affairs, submitted a report recommending extension of the Selective Training and Service Act without change. S. Rep. 126, 79th Cong., 1st Sess., 91 Cong. Rec. 2801. On May 9, 1945, nearly a full year after issuance of Memorandum 190-A, Congress extended the Act without changing any of the provisions of Section 8 (Pub. L. 54, 79th Cong., May 9, 1945). We submit that such reenactment evidences congressional acquiescence in and approval of the administra-

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veteran to the same relative position he had before induction is supplied by the debates on the "work or fight" bill (H. R. 1752, 79th Cong., 1st Sess.). As that bill passed the Senate, the following appeared with reference to the reemployment rights of civilian workers "drafted" under the bill:

"Provided that this section shall not be construed to confer greater employment rights than the individual would have had if he had remained employed in such position during the period of the employment or employments accepted by him upon the request of the Chairman of the War Manpower Commission."

When explaining this proviso to the Senate, Senator Thomas said (91 Cong. Rec. 1423):

"The reemployment rights so provided are substantially those provided for veterans in Section 8 of the Selective Service and Training Act, with two exceptions: First, * * * (application for reemployment must be filed within 30 days) * * *; and second, civilians accorded reemployment rights under this bill are not to secure greater employment rights than they would have had if they had remained in their original positions for the period during which they are employed in jobs accepted by them under the bill."

See also 91 Cong. Rec. 1551. Obviously there would have been no occasion for inclusion of the above proviso if Section 8 had been thought to have the effect indicated by the court below.

tive construction placed upon the Act by the Director of Selective Service:[13] *McCaughn* v. *Hershey Choc. Co.*, 283 U. S. 488, *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273; *National Lead Co.* v. *United States*, 252 U. S. 140–146.

It is clear, moreover, even aside from the fact of legislative ratification of the administrative construction of the Act, that such construction is the only one which renders none of its language superfluous and which is entirely consonant with the congressional purpose. The decision below drains the provision prohibiting discharge of the veteran without cause for a year of all vitality; makes the statutory right of the veteran to employment for a year subordinate to the rights of other employees established by collective bargaining agreements; discriminates between veterans returning to employment in unionized industry and those

[13] The court below noted (R. 187) that the National War Labor Board and the Solicitor of the Department of Labor had adopted a view different from that of the Director of Selective Service with respect to veterans' reemployment rights under Section 8 of the Act. The court said that it "would be baseless in fact" "to suppose that Congress," in reenacting the Act, "was familiar with one set of rulings and not with the other" (R. 190). But this overlooks the fact that the Director of Selective Service was the only administrative official among those who had interpreted the Act who had any responsibility for its administration or enforcement. His interpretation alone, therefore, comes within the rule that reenactment by the legislature of language which has been administratively construed results in the legislative ratification and adoption of such construction.

returning to non-unionized employment; and leaves the veteran, after service in the armed forces, with no greater right to employment than would have been his had he never entered the service of his country. But if the policy of the Act is to be served and its language honored, the veteran must be recognized as having for one year a right to employment superior to all others. It is only in this way that he can regain the competitive position he left in order to serve his country. It cannot be done by placing the veteran, disadvantaged as he is by his period of service, in open competition with those who have made no similar sacrifice.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below is erroneous and should be reversed.

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APRIL 1946.

## APPENDIX

The Selective Training and Service Act of 1940 as originally enacted September 16, 1940, c. 720, 54 Stat. 885, 50 U. S. C. App. 301 *et seq.*, provided in part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That* (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.
>
> (b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.
>
> * * * * *
>
> SEC. 8. (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes ap-

plication for reemployment within forty days after he is relieved from such training and service—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have

power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * *

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed

any period of their training and service under this Act.

* * * * *

SEC. 10. (a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) to create and establish a Selective Service System * * *.

(3) To appoint, by and with the advice and consent of the Senate, and fix the compensation at a rate not in excess of $10,000 per annum, of a Director of Selective Service * * *.

(b) The President is further authorized, under such rules and regulations as he may prescribe, to delegate and provide for the delegation of any authority vested in him under this Act to such officers, agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

* * * * *

SEC. 16. (a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) All the provisions of this Act, except the provisions of sections * * * 8 (g) * * * shall become inoperative and cease to apply on and after May 15, 1945 * * *.

By Act of December 5, 1943, c. 342, § 3, 57 Stat. 596, 50 U. S. C. App. § 310 (Supp. IV), Sec-

tion 10 (b) of the Selective Training and Service Act of 1940 was amended to read as follows:

> (b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except Section 9) * * *.

By Act of December 8, 1944, c. 548, 58 Stat. 798, 50 U. S. C. App. § 308 (Supp. IV), Section 8 (b) of the Selective Training and Service Act of 1940 was amended to read as follows:

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than than one year—
>
> (A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;
>
> (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

By Act of May 9, 1945, Public No. 54, 79th Cong., 1st Sess., c. 112, Section 16 (b) of the

Selective Training and Service Act of 1940 was amended to read as follows:

> (b) All the provisions of this Act, except the provisions of sections * * * 8 (g) * * * shall become inoperative and cease to apply on and after May 15, 1946, or the date of the termination of hostilities in the present war, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, * * * As used in this section the term "date of the termination of hostilities in the present war" means the date proclaimed by the President as the date of such termination or the date specified in a concurrent resolution of the two Houses of Congress as the date of such termination, whichever is the earlier.

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# Supreme Court of the United States

## OCTOBER TERM, 1945

**No. 970**

ABRAHAM FISHGOLD,
*Plaintiff-Appellant,*

vs.

SULLIVAN DRY DOCK & REPAIR CORPORATION,
*Defendant-Appellee,*

ROY GRANATA, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O.,
*Intervenor-Appellee.*

## BRIEF OF DEFENDANT-APPELLEE

J. READ SMITH,
*Counsel for Defendant-Appellee.*

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## BRIEF OF DEFENDANT-APPELLEE

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### Opinion Below

The majority and dissenting opinions in the United States Circuit Court of Appeals, Second Circuit (R. 181-195), are not yet reported.

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### Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 4, 1946 (R. 195).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925.

The jurisdiction of the United States District Court, which rendered the judgment from which the appeal was taken, was conferred by Section 8(e) of the Selective Training and Service Act of 1940 as amended (Public Law 360, 77 Congress, U. S. Code, Title 50, War App. Sections 301-318).

## Question Presented

The question before the Court is the construction of certain provisions of the Selective Training and Service Act of 1940, as amended.

The specific question at issue may be stated as follows:

Whether the Selective Training and Service Act of 1940, as amended, guarantees to a returning veteran, who has been restored to his former job, after satisfactory completion of his service in the armed forces and discharge therefrom, the right to hold that job for a period of one year even though to do so must result in the displacement of a non-veteran having greater length of service in the plant of their employment.

## Statute Involved

The applicable provisions of the Selective Training and Service Act of 1940, as amended.

## Statement

The plaintiff, a welder, was employed by the defendant Sullivan Dry Dock & Repair Corporation on December 21, 1942, and was steadily employed until May 22, 1943, when

he was inducted into the Army of the United States, under the provisions of the Selective Training and Service Act of 1940, as amended.

He was honorably discharged and received a certificate of satisfactory completion of his period of training and service on July 12, 1944 (R. 55-57).

The defendant restored him to his former position, in its employ, on August 21, 1944, which was within forty days after his discharge, in compliance with the condition of the Act (R. 57). Thereafter, because of a decrease in the amount of work available, the plaintiff was "shaped-up" on nine separate days, during April and May of 1945 (R. 60, 61).

On the aforesaid days there was not sufficient welding work available at the defendant's plant to occupy all hands. On these days defendant was required and did give preference to other welders, not veterans of World War II, who had higher shop seniority than the plaintiff.

Prior to this action the intervenor notified the defendant that it objected to the employment of plaintiff "out of his seniority position" while men of greater length of service were not put to work (R. 152). A non-veteran had been "shaped-up" whereas the plaintiff had been permitted to work (R. 70, 71, 73). This non-veteran had greater length of service than the plaintiff, whereupon the intervenor protested to the defendant, but the defendant retained the plaintiff at work in preference to the non-veteran. The matter was then submitted to an arbitrator appointed by the National War Labor Board. The arbitrator decided in favor of the non-veteran, holding that he should not have been laid off in order to provide work for the plaintiff (R. 21, 74, 75).

After this decision, the plaintiff was laid off on the days specified and the non-veteran was put to work in his place. Plaintiff subsequently commenced this action for loss of wages suffered by him by reason of defendant's action in shaping him up on nine days prior to the expiration of one year from the date of his restoration to his former position.

He also asked for a declaratory judgment that the defendant be required to continue him in its steady employment for a period of one year from August 25, 1944. The issues were tried in the United States District Court for the Eastern District of New York before Judge Matthew T. Abruzzo on August 26 and August 29, 1945.

A decision was rendered on August 30, 1945, in favor of plaintiff for a money judgment in the amount of $86.40 based upon his loss of wages for nine days.

Plaintiff's request for declaratory judgment, however, was denied because a year from the date of plaintiff's employment had already expired and that period was the limitation of time covered by the statute (R. 150).

The judgment was appealed from to the United States Circuit Court of Appeals for the Second Circuit, where it was argued on February 5, 1946, and a decision was rendered March 4, 1946, reversing the judgment and dismissing the complaint.

The majority opinion was written by Circuit Judge Learned Hand and Judge Harrie B. Chase wrote a dissenting opinion. Judge Jerome N. Frank, the third member of the Court, concurred with Judge Hand.

## Position of Defendant-Appellee

The position of the defendant, Sullivan Dry Dock & Repair Corporation, is somewhat different than that usually assumed by defendants in litigation (R. 52, 53). Although it is vitally interested in a final and unequivocal decision of this perplexing and important question, it has not, nor does it now, attempt to side with the veteran involved or with the union.

Throughout this case, it has acted more in the nature of *amicus curiae* than a militant defendant. A casual examination of the record will indicate that it went to great lengths in order to assist not only the Court but the plaintiff and intervening union local in presenting all necessary

and pertinent data upon which to base a final conclusion. Indeed, this fact was commented upon by the Trial Judge (R. 147).

The defendant in its answer (R. 8-26) set forth the entire history of the dispute. It also produced every witness with the exception of the plaintiff himself who testified at the trial.

Although against the defendant, the judgment of the Trial Court was appealed to the Circuit Court of Appeals by the intervenor and not by the defendant (R. 176, 177).

The defendant is well aware of the divided opinion in the District Courts wherein decisions have thus far been recorded (*Whirls* v. *Trail Mobile Company* [D. C. S. D. Ohio]; *Olin Industries, Inc.* v. *Barnett* [D. S. C. D. Ill.]), and also of the speed with which the veterans of World War II are returning to their former positions of employment. It is aware also of its own personal circumstances with the attendant problems brought on by this question and it is, of course, quite obvious that almost every other employer throughout the nation is in a similar position.

## Conclusion

For the reasons stated, it is respectfully requested that this Honorable Court render a decision finally settling for all concerned this important question.

Respectfully submitted,

J. Read Smith,
*Counsel for Defendant-Appellee.*

FILE COPY

No. 970

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1945

ABRAHAM FISHGOLD,

*Petitioner,*

*vs.*

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C.I.O.,

*Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR ROY GRANATA, ETC., RESPONDENT

M. H. GOLDSTEIN,
*Attorney for Granata, etc., Respondent.*

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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 970

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ABRAHAM FISHGOLD,

*Petitioner,*

*vs.*

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C.I.O.,

*Respondents*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## BRIEF FOR ROY GRANATA, ETC., RESPONDENT

---

### Opinions Below

The opinion of the District Court of the United States for the Eastern District of New York (R. 147-151) is reported in 62 F. Supp. 25. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 181-195) has not yet been reported.

## Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 4, 1946 (R. 199). The petition for a writ of certiorari was filed on March 19, 1946, and granted on April 1, 1946. Jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)).

## Statement

*Applicable Statute*

Those provisions of the Selective Training and Service Act of 1940, as amended (U. S. C., Title 50, Sec. 308), which are applicable in this case, appear at the end of this brief as Appendix A.

*The Question Presented*

Whether Section 8 of the Selective Training and Service Act of 1940 gives to an employee who has completed his period of training and service under such Act and been restored by his employer to the position held by him prior to his induction such a guaranty of actual work in such position for a period of one year after restoration thereto as would make it a violation of the Act for the employer temporarily to lay off such veteran for the same reasons and pursuant to the same rules as had applied to such veteran's employment prior to his induction.

*Facts of the Case*

This case began as a suit brought in the District Court of the United States for the Eastern District of New York under Subsection (e) of Section 8 of the Selective Training and Service Act of 1940, as amended (hereinafter referred to as the "Act"). The plaintiff, petitioner in this Court,

was an employee of the respondent, Sullivan Drydock & Repair Corporation (hereinafter referred to as the "employer" or "Corporation"), who had been inducted into military service and subsequent to his discharge therefrom had been re-employed by the Corporation. He sought a judgment against the Corporation for wages lost by him on eight (8) days during which petitioner had been "shaped up" or laid off, some months prior to the expiration of one year from the date of his reinstatement. Petitioner also sought a declaratory judgment (1) requiring the employer to refrain from "shaping up" or laying off the petitioner until after the expiration of one year from the date of his reinstatement, and (2) declaring that the insistence, by the labor union representing the Corporation's employees, upon the Corporation's compliance with the seniority provisions of the collective bargaining agreement between such union and the Corporation was not a good cause for "shaping up" or laying off the petitioner during such year.

Local No. 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. (hereinafter referred to as the "Respondent Union"), upon petition was by the District Court given leave to, and did, intervene, file an answer, and participate in the trial of the case.

The evidence and testimony adduced at the trial showed that on February 20, 1942, the Respondent Union was, pursuant to the National Labor Relations Act (U. S. C. Title 29, Secs. 151-166, and particularly Sec. 159) certified by the National Labor Relations Board as the exclusive representative of all the Corporation's employees, including welders (R. 64). Pursuant to the requirements of the National Labor Relations Act (see *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514) the Corporation on April 6, 1942, entered into a written contract with the Union, stipulating the terms and conditions of employment which were to prevail in the employer's ship-repair yard for all employees, including

welders (R. 65). This contract continued in effect until May 17, 1944, when a new collective bargaining contract was entered into by the Corporation and the Union.

One of the provisions of said collective bargaining contract of April 6, 1942, was as follows (R. 72):

> "In all cases of promotion, increase or *decrease in the working force*, the total accumulated length of service and ability to do the job shall be the basis for any such promotions or increases or *decreases in the working force*." (Emphasis supplied.)

On February 25, 1944, the Shipbuilding Commission of the National War Labor Board, pursuant to the War Labor Disputes Act of June 25, 1943, issued a Directive Order, which by its terms required the Corporation and the Union to incorporate the provisions thereof in a written contract. Among such provisions was the following (R. 67; Defendant's Exhibit "A"):

> "Promotions and reclassifications and increases or *decreases in the working force* shall be based upon length of service and ability to do the job. Whenever, between two or more men ability is fairly equal, length of service shall be the controlling factor." (Emphasis supplied.)

Pursuant to the Directive Order of the National War Labor Board the employer and the Union on May 17, 1944, executed a collective bargaining contract which incorporated the above quoted provision (R. 72), and which contract was in effect on August 25, 1944, the date of petitioner's restoration to his position, and is still in effect (R. 67).

The petitioner, Abraham Fishgold, was hired by the employer as a welder on December 21, 1942 (R. 100), when the collective bargaining contract of April 6, 1942, was still in effect. The petitioner became, and at all times mentioned in the complaint was, and now is a member of the respondent

Union (R. 47). On May 22, 1943, after having been in the service of the employer for five months, the petitioner was inducted into the armed forces (R. 57). Within forty days after his discharge from the armed forces, petitioner applied for and was restored by the Corporation to his former position as a welder (R. 57).

Approximately seven months after he was restored to his position, the petitioner, although reporting for work, was not assigned to work on nine days during a period beginning April 9, 1945, and terminating May 24, 1945 (R. 59). This failure on the part of the Corporation to supply the petitioner with work was due to the operation of the so-called "shape-up" system (R. 83), which had been in effect at the employer's ship-repair yard prior to and at the time of the petitioner's induction into the armed forces and had then operated in the same fashion as during the period April to May, 1945 (R. 92). Briefly described the "shape-up" is the system whereby in ship-repair yards, and other industrial establishments in which the available amount of work fluctuates from day to day, employees are notified that their services, because of a reduction in the available work, will not be required on the following day (R. 83). The employees "shaped-up" nevertheless usually report for work on the following day. From among those so reporting, their foreman or other supervisor selects such number as may be required for the work then available. This selection is made on the basis of the individual employee's ability to do his work and on his seniority, or relative length of service with the employer; the employee with the greater seniority being the first assigned to work, the employee with the next greater length of service being next assigned, and so on until all "shaped-up" employees for whom work is available have been assigned to work (R. 85-86). The "shape-up" has been in existence in all the ship-repair yards in the Port of New York for at least twenty-six

years and is an unavoidable practical method of adjusting the working force to the amount of work available (R. 90-91).

The "shape-up" notice differs radically from the notice given to an employee who is discharged (Defendant's Exhibits "C" and "D"); the "shaped up" employee retains the identification badge issued to him by the employer, is not required to remove his tools from the employer's yard or shop, and is not required to fill out a new application for employment upon return to the yard after receiving a "shape-up" notice (R. 87).

The "shape-up" of the petitioner was occasioned as follows:

During March, 1945, the amount of work available for welders in the employer's shipyard was insufficient to afford work for all the welders in its employ. Since he had lower seniority than other employees, the petitioner was "shaped up" on one or more days during March, 1945 (see Arbitrator's Award, annexed to Defendant's Answer, R. 13-21, and admitted in evidence R. 77-78). Petitioner protested to Selective Service Headquarters which, in turn, instructed the employer to keep petitioner at work. Such instructions were contained in a letter from the New York State Director of Selective Service Headquarters dated March 31, 1945, and reading in part as follows (R. 16, 74):

> "In the case of the above named veteran, it appears that he was laid-off under a so-called 'shape-up' because, from time to time, there was not enough work to go around for all the employees and that non-veterans with greater union seniority than he had and were doing exactly the same kind of work that he was, were kept at work on the 'shape-up'."
>
> "It is the position of Selective Service System that a veteran who has been reinstated in employment may not be laid off or denied the right to work if there is

work to be done which he is capable of doing. In other words, under a 'shape-up' or any other similar practice, if there is *some* work available for *some* men, the veteran must be kept at work even though this may necessitate laying off non-veterans with greater union seniority."

As a result of the above quoted letter the Corporation on March 13, 1945, "shaped up" one of its welder employees, G. Jackerson, who had greater seniority than petitioner (R. 89). The Union, by letter dated March 16, 1945, protested to the employer against this departure from the above quoted provision of the collective bargaining contract (Plaintiff's Exhibit 2). On April 2, 1945, the Union filed a written "grievance" with the employer, in accordance with the procedure stipulated in the collective bargaining contract between them, in which "grievance" the Union renewed its complaint against the "shape-up" of the employee Jackerson in favor of the petitioner (R. 71). Since the Corporation felt constrained to abide by the instructions received from Selective Service Headquarters, it decided the protest against the Union so that arbitration of the dispute became necessary, and the Corporation and the Union, in accordance with their collective bargaining agreement (R. 67-68) entered into a submission stipulating the issue to be arbitrated (Defendant's Exhibit "B"). The National War Labor Board appointed Frank Harris, Esq., as Arbitrator, and he, after hearing the case decided that the petitioner should have been "shaped up" and Jackerson should not have been "shaped up" (R. 73, 77, and Arbitrator's Award, R. 13-21).

Since the collective bargaining contract between the Union and the Corporation provided that the decision of the Arbitrator "shall be final and binding upon all the parties hereto," the employer thereafter, on the days hereinabove enumerated, "shaped up" Fishgold, rather than

Jackerson, when there was not enough work for both of them.

At the conclusion of the trial the Union made a motion to dismiss the complaint on the ground that neither the allegations nor the proofs demonstrated the existence of a cause of action. The motion was denied. The District Court held, instead, that during the year following his re-employment by the Corporation the petitioner was entitled to be assigned to work, on any day that work was available, in preference to all employees who were not veterans of World War II (R. 150). The District Court entered judgment for the petitioner for $86.40, representing wages lost by him on the nine days during which he had been "shaped up." The declaratory judgment requested by the petitioner was, however, denied, because the year during which the Court held the petitioner was entitled to preference had expired prior to the close of the trial.

The effect of the District Court's judgment being to make nugatory, as between veteran and nonveteran employees, the seniority provisions of its collective bargaining contract, the Union appealed to the Circuit Court of Appeals. That Court, Judge Chase dissenting, reversed the judgment of the District Court and dismissed the petitioner's complaint.

## Summary of Argument

Neither subsection (b) nor subsection (c) of Section 8 of the Selective Training and Service Act entitles a veteran, insofar as his right to continuous actual work is concerned, to an absolute priority over all nonveteran employees. Congress, by directing in subsection (b) that an employer shall restore a veteran "to such position [as he had when inducted] or to a position of like seniority, status and pay * * *", clearly demonstrated its recognition that

the position to which the veteran must be restored is one which may not have required the employer to afford the veteran employee continuous actual work. Any other interpretation would require an inference that Congress was oblivious of the facts which characterize our industrial system and would further require that the clear and significant language employed by Congress be strained. Nor did Congress, in subsection (c) of Section 8, guarantee to the veteran greater rights to continuous actual work for the employer than the veteran's original contract of employment, or original position with the employer, gave him. The generally recognized and accepted distinction between a "discharge" and a "lay-off" lends credence to the contention that Congress used the word "discharge" in Section 8(c) in the sense of a permanent and complete termination of the employer-employee relationship. This contention is further supported by the very language used in Section 8(c). In this case it has been established that the veteran was restored to his former position, that this was done without loss of seniority and that he was never discharged. The petitioner has, therefore, failed to make out any cause of action.

Even if the language of Congress be strained for the purpose of inferring an intent to include within the meaning of the word "discharge" a lay-off or shape-up, it is submitted that such "discharge" was, in the instant case, not without cause and, hence, was permissible under the Act. In the first place, Congress' language clearly indicates that, while it intended to guarantee to a veteran a restoration to his own job—or to a similar one—it did not intend to give him someone else's job, the result sought by the petitioner. Moreover, the validity of the cause for petitioner's discharge—if a lay-off may be so construed—is reinforced by the following uncontradicted facts: (a) that

the "shape-up" was made necessary by a contract which the National Labor Relations Act made it mandatory upon the employer to enter into and comply with; (b) that an arbitrator whose decision was legally binding upon the employer had ordered the employer to "shape-up" the veteran; and (c) that the clause under which the veteran was "shaped-up" was the result of a directive order by the National War Labor Board, which was constitutionally empowered to make such orders. The existence of these factors requires the conclusion that, if the veteran's "shape-up" was, indeed, a "discharge", it was a discharge for good cause within the meaning of the Act.

Finally, neither the legislative history nor the interpretations of Section 8(c) thereof issued by the Director of Selective Service in Memorandum 190-A support the petitioner's claim to a preference in employment in the face of the failure of the Act's clear language to grant such a preference.

## ARGUMENT

### I

### The Provisions of Section 8 of the Selective Training and Service Act of 1940 Contain No Guaranty Against, and Do Not Make Unlawful, Occasional Temporary Losses of Work Suffered by a Veteran Restored to His Position, if Such Losses of Work Are in Conformity with His Agreement of Employment.

The contention of the petitioner in the court below—and we assume it will be reiterated here—was that the word "position" was used in Section 8 of the Act synonymously with "job" or "employment", and has significance only if it refers "to the veteran's actual employment and work status, and not merely [to] his standing in relation to other employees". The guaranty which Section 8 carries

against reduction in the restored veteran's seniority, is a benefit which Congress intended to confer upon the veteran in addition to restoration to his position, argued the petitioner, and may not be interpreted as limiting his right to continuous actual work on the basis of whether the veteran's seniority standing is less than that of nonveteran employees. Finally, the petitioner argued, the prohibition against a restored veteran's discharge during the year following his restoration to his position also demonstrated that it was the Congressional intent that during such year the veteran be kept actually at work and be given preference over nonveteran employees in allocation to the veteran of such work as is available. In the petitioner's view, the collective bargaining contract, whose provisions led up to the shaping up of the petitioner, was a contract between the employer and a third party which neither bound the petitioner nor measured his right to work on any day, nor constituted justification or cause to the employer for shaping up the petitioner.

It is obvious from the foregoings that petitioner bases on both subsection (b) and on subsection (c) of Section 8 of the Act his contention that he is entitled, as regards his right to work on any day, to an absolute priority over all nonveteran employees. It is the respondent Union's position that neither subsection (b) nor subsection (c), nor the two combined, grant the petitioner such priority.

1. *Subsection (b) of Section 8 Clearly Contemplates that the Position to Which the Veteran Must Be Restored Is One Which May Not Have Required the Employer to Afford the Veteran-Employee Continuous Actual Work.*

Subsection (b) provides that

"In the case of any such person who, in order to perform such training and service, has left or leaves

a position, other than a temporary position, in the employ of any employer * * *

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay * * *"

From the foregoing it is clear that whatever else may have been intended by Congress, the employer-employee relationship is required to be restored when the veteran makes application for reemployment. But, even if it be conceded as petitioner contended below, that the word "position" is synonymous with "job" or "employment", and has significance only if it refers to the veteran's actual employment and work status, there still remains the question of how much work the employer must, on any day, or during any week, assign to the veteran. The answer to that question is to be found, of course, in the agreement of employment out of which every employer-employee relationship flows, and which determines the conditions and characteristics of the position created by, or existing as the result of such employer-employee relationship. It is clear that the phrase "such position" used in paragraph (B) refers to the position, mentioned in subsection (b), which the employee leaves in order to perform the training and service required by the Act. Accordingly, the requirement of paragraph (B) that the veteran be restored to "such position" means that the veteran is to be accorded such rights as were created by the agreement of employment which he had when inducted. That agreement of employment, like many others, may have been one which entitled the employee to work of a given kind on every day on which such work was available in the employer's plant. On the other hand, like many similar agreements of employment, it may have bound the employer to give, and the employee

have promised to perform, work on only two days a week, all other similar work having already been promised to other employees in the latter employees' agreements of employment, and the veteran having desired to obtain only two days of work per week. Or, the veteran's agreement of employment may have been with an employer operating in a seasonal industry. Under such circumstances the veteran's agreement of employment may merely have embodied the promise that he would be assigned to work on each workday of the week during the peak season only, and that as the season waned, he would be assigned only such work as could not be performed by a small body of employees whose agreements of employment provided that they would be kept at work without interruption throughout the year. If such were the returning veteran's original agreement of employment, such also was the character of the position which he left in order to enter the armed forces and the position to which he is entitled to return upon discharge from the armed forces. Congress having directed that the veteran be restored to such position as he held when inducted, that direction cannot be held to require that the veteran be given more actual work than he had agreed to accept and the employer had agreed to assign in connection with the position created by their agreement of employment.

To ascribe to Congress an intention other than that above described would imply that Congress was oblivious of the actual facts characterizing our industrial system; that Congress did not know that hundreds of thousands, indeed millions, of positions "other than temporary" were either part-time positions or seasonal positions; or at least that Congress intended either to give employees who held such positions no right to be restored to such positions, or to expand the rights attaching to such positions beyond the

scope originally agreed upon by the employee and employer. Such suppositions cannot find support in fact and must be rejected. That this is so is shown by further analysis of subsection (b).

Subsection (b) gives the employer the right to restore the veteran either to the position which he originally held, or "to a position of like seniority, status, and pay * * *". The conditions under which a substitute, like position may be granted to the veteran, instead of the position originally held by him, are not specified; the employer's freedom of action in this respect is preserved. The substitute position must, however, be like, that is, the same as, the original position in respect of three characteristics: Seniority, status, and pay. In this provision we find a clear indication that Congress understood and made provision for the fact that the original position from which the veteran had been inducted had, as one of its characteristics, that of seniority. The term "seniority," having been used by Congress, must be presumed to have been used by it in the meaning commonly ascribed to it. That meaning is not at all uncertain.

> "'Seniority' represents in the highest degree *the right to work*, and by seniority the oldest man in point of service, ability and fitness for the job being sufficient, is given choice of jobs, is first promoted within the range of jobs subject to seniority, *and is the last laid off*, proceeding so on down the line to the youngest in point of service." (Emphasis supplied.)
>
> *Dooley* v. *Lehigh Valley Railroad Company*, 21 A. (2d) 334, 338, 339 (New Jersey).

> "'Seniority' * * * means that the employee who enters the service of a railway * * * on a specified division on a certain date must be preferred to the one who enters the same service at a later date. *If the* * * *

*is slack so that fewer men are needed, the one hired last is laid off first.*" (Emphasis supplied.)

*Geo. T. Ross Lodge, etc.* v. *Brotherhood of Railroad Trainmen*, 254 N. W. 590 (Minn.)

"'Seniority' as used in determining employee's right to continued employment as against rights of another employee comprehends length of period of service in office or entrance upon an office ant rior to that of another."

*Unkovich* v. *New York Central Railroad Company*, 16 A. (2d) 558, 560 (New Jersey).

"'Seniority,' as applied to trainmen, means that a man shall be entitled to preference in matter of choice of, *and right to work* in his occupation in accordance with length of time he has been employed * * *" (Emphasis supplied.)

*Grand International Brotherhood of Locomotive Engineers* v. *Mills*, 31 P. (2d) 971, 979 (Arizona).

Thus we find that Congress understood and provided for the contingency that the original position which the veteran had held was likely to be one which did not, under the agreement of employment, guarantee continuous actual work. For, in using the word "seniority," Congress was merely availing itself of a normal, linguistic convenience—the use of a single word as a symbol for a somewhat complex concept; in this instance, the concept embodied those characteristics of the veteran's position which dealt with the amount of work which was to be assigned to him, his right to share in such work as was available, the order in which such sharing was to be done among employees, etc. The fact that Congress, instead of directing that these characteristics of the veteran employee's original position should be ignored, and instead of using apt words to embody such direction, stipulated that such characteristics be retained in the substitute position which the employer was

left free to give the veteran in the place of his original position, shows conclusively that the petitioner's contention finds no support in subsection (b) of Section 8.

The petitioner—as also the dissenting judge in the court below—made much of the fact that in the case at bar the restored veteran would be deprived of the opportunity to work on every day on which work was available solely by reason of the fact that "someone," "some third party," had a contract with the employer which so required. This argument, of course, overlooks the fact that the seniority rights and disadvantages which Congress envisaged might attach to the veteran's original position, could have resulted from the explicit, perhaps even written, agreement of employment between the veteran and the employer. It would appear from the petitioner's and the dissenting judge's arguments that to such a situation they would not apply the contention that restoration of the veteran to his position required that he be kept actually and continuously at work in preference to other employees. This in itself shows that such contention is untenable. Even, however, if there were some color of support for the petitioner's contention that the employer's contract with a "third party" should not affect his right to be given continuous actual work, such contention would not be applicable to the facts in the case at bar, nor to the facts in the majority of similar cases. The "third party" in this and in the vast majority of similar cases, is a union, lawfully certified as the exclusive representative and agent of all the employer's employees for purposes of determining by contract with the employer the terms and conditions of employment to be granted to the employees. In other words, the respondent union was in this case the petitioner's alter ego. The contract which it made with the employer was made, in part, on the petitioner's behalf and was inescapably and wholly incorporated in his individual agreement of employment.

*J. I. Case Company* v. *N. L. R. B.*, 321 U. S. 332. Accordingly, when the Corporation restored the petitioner to his position and seven months thereafter shaped him up or laid him off for a day or two, it gave him no less than Congress had intended he should have—those rights as respects continuity of actual work which he had in the position he left at the time he was inducted.

2. *Subsection (c) of Section 8 Does Not Guarantee to the Veteran Greater Rights to Continuous Actual Work for the Employer than the Veteran's Original Contract of Employment—or Original Position with the Employer—Gave Him.*

Subsection (c) of Section 8 of the Act reads as follows:

> "(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored *without loss of seniority*, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and *shall not be discharged* from such position without cause within one year after such restoration." (Emphasis supplied.)

In the court below the petitioner attempted to justify his claim that he should not have been "shaped up" not only on the ground that the word "position" meant continuous actual work, but also on the ground that the prohibition of discharge from such position, contained in subsection (c), applied equally to any failure of the employer to assign work to the petitioner on any day on which there was welding work to be done in the Corporation's shipyard. In other words, the petitioner argued that "discharge" and

"shape-up" or lay-off are synonymous. The majority of the court did not accept this argument, but the dissenting judge not only adopted it but even went so far as to say,

> "To deny the veteran the right to work in that position during the year is a 'discharge' from it for the period of his deprivation and calling such action a 'lay-off' or anything else one may choose for a name neither alters the act nor justifies the action. Such a choice of labels is simply what should be recognized as a futile attempt to circumvent the statute."

It is respectfully submitted that in their zeal both the petitioner and the dissenting judge ascribed to the word "discharge" a meaning in which it is never used and which the language of subsection (c) itself demonstrates that Congress could not have intended.

The ordinary and universally accepted meaning of the word "discharge" is a permanent termination of the employment relationship. Thus the Oxford Dictionary defines "discharge" to mean: "to relieve of a charge or office: (more usually) to dismiss from office, service or employment; to cashier." "Discharge" has also been defined to mean "that the employer no longer needs or desires the employee's services, and that all contractual relations between them are terminated." *Stitt* v. *Locomotive Engineers' Mutual Protective Association*, 142 N. W. 1110, 1113 (Mich.). "A 'discharge' is the termination of employment at the will of the employer with prejudice because of some fault on the part of the worker." *International Association of Machinists* v. *State, ex rel. Watson*, 15 So. (2d) 485, 490 (Fla.).

Lay-off, on the other hand, is defined in the Oxford Dictionary as "a period during which a workman is temporarily dismissed or allowed to leave his work; that part of season of the year during which activity in a particular

business or game is partly or completely suspended; an off-season."

An exhaustive and carefully documented treatise on Section 8 of the Act is to be found in 54 *Yale Law Journal* 417 (March, 1945). At page 425 of the article cited will be found the following:

> "Even if it be assumed that the reemployment right is unqualified, the further inference that there is a virtual one-year immunity against lay-off, although a necessary buttress to absolute priority, is more than the statutory exemption from discharges 'without cause' requires. Such a construction ignores a distinction clearly understood and carefully guarded in industry, and presumably recognized by Congress, between 'discharge,' an extreme form of discipline, and 'lay-offs,' which are recognized as normal incidents of business recession during which seniority rights often are retained or accrue."

It is also highly significant that an arm of the Federal Government whose very existence is justified by its expert knowledge of industrial practices and of industrial terminology, makes the same distinction between "discharge" and other forms of temporary loss of work. In its Bulletin No. 686, "Union Agreement Provisions," the Bureau of Labor Statistics of the United States Department of Labor captions Chapter 16 (page 125), "Lay-off and Reemployment" while it captions Chapter 18, "Discharge and Quits."

> "Is 'discharge' synonymous with 'lay-off'? Discharge is universally recognized as meaning to terminate employment, whereas lay-off means to suspend or cause to cease work for a time. The courts have recognized that difference in these words as does the dictionary. See 24 Words and Phrases 447; Teller on Labor Disputes and Collective Bargaining, Vol. 2, Sec. 276, p. 753; *North Whittier Heights Citrus Association*

v. *N. L. R. B.*, 109 Fed. (2d) 76; *Waterman Steamship Co.* v. *N. L. R. B.*, 309 U. S. 206." Arbitration Award by Dudley E. Whiting, *In re Dow Chemical Co.*, and *International Union, United Automobile, Aircraft, Agricultural Implement Workers of America*, 17 Labor Relations Reporter 646."

The general recognition by the authorities of the distinction between "discharge" and "lay-off" would seem to give ample indication that Congress used the word "discharge" in subsection (c) in the sense of a permanent and complete termination of the employer-employee relationship. However, Congress itself gave evidence, contained in subsection (c), that it fully understood the difference between "discharge" and other forms of loss of work.

Section 8(c) provides that the veteran restored to his former position "shall be entitled to participate in insurance and *other benefits* offered by the employer pursuant to *established rules and practices* relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *" (Emphasis supplied). In the same sentence of Section 8(c) is contained the further provision that the veteran shall be restored to his position "without loss of seniority." In other words, Congress directed that as to insurance and other benefits the restored veteran's rights should be governed by the employer's "established rules and practices" as to such benefits, and at the same time provided that the veteran should be restored to his position "without loss of *seniority*." It is thus obvious that in using the word "seniority" Congress must have meant that the benefits governed by seniority were different from the "other benefits" governed by other "rules and practices." What phase of the employment relation did Congress deem to be governed by "seniority"? Why did it provide against the restored veteran's loss of "se-

niority"? Congress could not have intended that "seniority" govern the order of "discharge," since as to "discharge" Congress itself provided a governing rule in Section 8 (c)—that a "discharge" could not be made except for cause. Equally Congress could not have intended that "seniority" govern insurance and similar benefits since it provided that such benefits be governed by "established rules and practices." The remainder of the area of employer-employee relationship to which the word "seniority" as used by Congress can apply is therefore the restricted area of transfer, promotion and *lay-off*. *Dooley v. Lehigh Valley Railroad Co., supra* and *Geo. T. Lodge, etc. v. Brotherhood of Railroad Trainmen, supra.*

Thus we see that Congress in protecting the veteran's seniority, knew of the existence of, and was providing for, the possibilities of lay-off. Accordingly Congress could not have used the word "discharge" in a sense which would make it applicable to a lay-off. Furthermore, since the loss of seniority against which Congress sought in subsection (c) to protect the veteran was loss of seniority in the position to which he was "restored," i. e., in his original position, it must follow that Congress was aware that such original position carried with it the possibilities of lay-offs and other types of temporary absence from actual work. It would, to say the least, have been highly inconsistent of Congress to intend that the veteran should be restored to a position in which breaks in the continuity of actual work might occur and yet to forbid the employer to permit such interruptions of continuous work. That the word "discharge" was not used in a meaning which would result in such inconsistency is further demonstrated by the reference in subsection (c) to benefits to be enjoyed by employees on furlough or leave of absence. That provision clearly indicates that Congress realized that the employer-employee relationship was not terminated, the employee was not deprived of

his position, simply by reason of absence from, or lack of actual work. In short, neither the requirement of subsection (b) that the veteran be restored to his original position or one of like seniority, nor the prohibition of the veteran's discharge without cause, creates any rights in the veteran in respect of the amount of actual work to be accorded him greater than the rights which his agreement of employment gave him, except insofar as the work made available to him depended upon continuance of the employer-employee relationship; that relationship alone the employer cannot, under subsection (c), terminate except for cause.

In the court below the petitioner argued that unless the strained and unnatural denotation for which he contended were given to the word "discharge", an employer might make nugatory the protection which Congress sought to give the veteran in his right of reemployment by refusing to assign actual work to the veteran immediately after the latter's restoration to his position. The prohibition against discharge contained in subsection (c), argued the petitioner, could only have meaning if the restored veteran was given work on every day on which work was available at the employer's plant. At the same time, petitioner conceded that if no work was available then the prohibition against discharge did not apply to the employer's failure, for short temporary periods, to assign work to the veteran. By this argument petitioner sought to obtain what he considered a benefit for himself. It is respectfully submitted, however, that in attempting to obtain this benefit, the petitioner used reasoning which went much too far and proved much too much. If, in order to protect the petitioner's right to work, it is necessary to give the meaning he contends for to the word "discharge", then it would be equally justifiable to hold that a shut-down by the

employer of his plant because the employer cannot, under such contracts as he holds or can obtain with his customers, make a profit, is equally a discharge without cause as the petitioner contends was his shape-up or law-off in the case at bar. For that lay-off was the result of the employer's need for operating under a contract which, as much as the price provisions in the employer's contract with customers, determines the possibilities of profitable operation of the employer's enterprise. It is difficult to conceive that Congress intended, or believed it had the power, to require a private citizen or corporation to continue operation of a business at a loss in order to afford continuous work to a veteran.

To give the word "discharge", as used in subsection (c), its commonly accepted meaning, does not deny to the veteran any benefit which Congress can reasonably be supposed to have intended for him. Subsection (c) seeks to protect the veteran's rights to participate in insurance and other benefits offered by the employer. Such other benefits might be in the nature of continued payment of wages during periods of the employee's illness, or the right to receive payments in lieu of wages upon permanent discharge. Such payments not uncommonly are quite substantial in amount, equalling as much as a half year's wages. (Chapters 8 and 14, "*Union Agreement Provisions*", Bulletin No. 686, U. S. Department of Labor; "*Collective Bargaining Negotiations and Contracts*", Division 35, p. 101, et seq. Bureau of National Affairs.) In other words, these benefits frequently are of much more significance to the employee than the benefit flowing from actual continuous assignment to work. Yet the restored veteran's right to participate in these benefits is made to depend upon the "established rules and practices * * * in effect with the employer * * *." The veteran is given

no preference over other employees and no benefits greater than those afforded by the employer's perhaps unilaterally established rules and practices. If Congress did not intended to grant such preference or greater benefit to the veteran in respect of these frequently more important rights it is difficult to believe that it intended to grant to the veteran, as to the frequently less important right of actual work in his job, the expanded benefits and preferential treatment for which the petitioner contends. This difficulty becomes the greater when it is remembered that seniority rights are almost always the creatures of collective bargaining agreements made for the employees—including restored veterans—by their own freely chosen agents or representatives for that purpose, their labor union. The zeal of Congress to benefit the veteran thus cannot be used as the basis for an inference that Congress used the word "discharge" in a meaning which would prohibit a lay-off of the veteran.

Thus, from the language of Section 8(c) of the Act it is clear that by the word "discharge" the Congress meant permanent severance of employment. In the case at bar, however, no showing whatsoever was made that there had at any time been a permanent severance of the petitioner's employment by the Corporation. On the contrary, the uncontradicted evidence was that the petitioner was never discharged. The witness Leighton, the petitioner's foreman, denied that he had ever discharged the petitioner (R. 83); the petitioner himself stated that he was still employed by the Corporation, that he had never been notified that his services were no longer needed (R. 80), and that he did not consider himself discharged when he *was* "shaped up" (R. 81). Even if this testimony is considered to be in the nature of conclusions of law and fact, there is still ample additional evidence in the record

that the "shaping up" of the petitioner cannot conceivably be considered as being a discharge, or permanent termination of the petitioner's employment, since his "shaping up" had none of the characteristics or consequences of a permanent termination of employment. Thus, petitioner was not given nor did he seek a release on the days he was "shaped up" (R. 81); deductions for his social security and other taxes continued (R. 81); he was not required to surrender his identification badge, or to remove his tools from the employer's premises (R. 87); and on again being assigned to work he was not required to fill out a new application for employment (R. 87).

Accordingly, the only conclusion that can be drawn in this case is that since petitioner admits he was restored to his former position, since he further admits that not only was this done without loss to him of any of his seniority, but that such seniority was zealously safeguarded both by the provisions of the collective bargaining contract, and by the employer's observance of seniority in making "shape-ups", and since he admits and the evidence establishes that he was never discharged, he failed to make out any cause of action.

## II

**Even if Loss of Work for One or More Days, Without Termination of the Employee Status, Be Considered as a "Discharge" Under Section 8 (c) of the Act, There Was Cause for Such "Discharge" in the Instant Case.**

It is the writer's sincere opinion, borne out by the background and circumstances of this case, as well as by the brief submitted by the petitioner to the court below, that the contention that "discharge" as used in Section 8(c) of the Act applies to a "shape-up" would not even have occurred to anyone, if it had not been for the issuance by

the Director of Selective Service of the so-called Local Board Memorandum 190-A. The opinions of the Director of Selective Service as expressed in that memorandum are therefore the actual basis for the bringing of this action. We shall, however, postpone consideration of whether those opinions have any validity or are entitled to any weight until a later point. Let us first consider whether, viewed in a light uncolored by the opinions expressed in Local Board Memorandum 190-A, the language of Section 8 (b) of the Act affords any basis for a contention that even if the petitioner's "shape-up" be considered a "discharge," such "discharge" was without cause.

In this connection, the first step of inquiry should be to ascertain just what it was that Congress sought to give to a veteran honorably discharged from the armed forces. The answer to this inquiry is to be found in paragraph (B) of Section 8 (b) of the Act. That paragraph provides that if the position held by an employee inducted into the armed forces

> "* * * was in the employ of a private employer, such employer shall *restore* such person to *such position* or to a position of like seniority, status, and pay * * *" (Emphasis supplied.)

This language clearly indicates that Congress sought to obtain for the veteran a restoration to his own job—or to a similar one—but not to someone else's job. In the instant case the complaint and the proofs both allege that the petitioner was returned to his own job by the employer. The uncontradicted proofs are to the further effect that the employer had on its payroll another employee, G. Jackerson. And finally the uncontradicted proofs are that on the basis of the collective bargaining contract into which the Corporation entered with the Union some eight months before the petitioner was even hired, the employee, Jackerson, held

a job which entitled him to be assigned to work in preference to employees junior in length of service with the Corporation. The provision of the collective bargaining contract which created this right in the employee, Jackerson, and the concurrent obligation upon the Corporation, remained in substance the same in the new collective bargaining agreement executed before the petitioner was restored to his position. The petitioner's complaint that he, and not Jackerson, was "shaped up" is thus, in effect, a claim that the petitioner should have been given Jackerson's job, despite the employer's contractual obligations to Jackerson. But we have seen that subparagraph (B) of Section 8 (b) of the Act requires merely that petitioner should have been restored to his own job—not that he should be given the job of another employee. In this case the employer insisted upon giving the petitioner that which Congress commanded that he be given and refused to give petitioner that which Congress did not direct that he be given, the result being the "shaping up" of the petitioner. It must certainly be clear that a "shape-up" or a "discharge" so caused, i. e., by the employer's granting the restored veteran that to which he is entitled and refusing to grant him more, cannot be called a causeless "discharge."

There are additional reasons for considering the "shaping up" of the petitioner to have been for excellent cause. The National Labor Relations Act provides that

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *". (U. S. C. Title 29, Sec. 159(a)).

This Court has interpreted the National Labor Relations Act as requiring that an employer enter into a written contract with the Union designated as such exclusive representative (see *J. H. Heinz Co.* v. *N. L. R. B.*, supra). Pursuant to this congressional enactment, as interpreted by this Court, the Corporation entered into collective bargaining contracts with the Union which stipulated, among other conditions of employment, the rules governing "shape-up." It has been held by the National Labor Relations Board, and by the courts that breach of the terms of such a contract by an employer will, under certain circumstances, constitute the commission of one of the unfair labor practices prohibited by Section 158 of the National Labor Relations Act. *In the Matter of Hughes Tool Co. and United Steelworkers of America*, 56 N. L. R. B., 981 (1944), enforced in *Hughes Tool Co.* v. *National Labor Relations Board*, 147 Fed. (2d) 69 (1945). See also footnote 40 at page 427 of the article in the Yale Law Journal cited above. Furthermore, as held in *Droste* v. *Nash-Kelvinator Corp.*, decided January 30, 1946, U. S. D. C., E. D. of Mich.,

> "There is no reason to believe that Congress intended to amend or repeal any part of the National Labor Relations Act when it passed the Selective Training and Service Act. 'No parts of the former Act are specifically repealed by the latter, and repeals by implication are not favored. *U. S.* v. *Borden Co.*, 308 U. S. 188.
>
> "The sections of the Selective Training and Service Act involved herein, like the National Labor Relations Act, are intended to protect the interest of the employees, and there is no positive repugnancy between the provisions of the new law and those of the old, and by a reasonable construction effect can be given to both Acts. *U. S.* v. *Borden Co.*, 308 U. S. 188, 198; *Walling* v. *Patton-Tulley Co.*, 134 F. (2) 945, 948."

The uncontradicted evidence in this case is, therefore, that the petitioner's "shape-up" was made necessary by a contract which an Act of Congress made it mandatory upon the Corporation to enter into and to comply with, under penalty of having imposed upon him the sanctions provided for in such Act. Assuredly it cannot be said that a "shape-up" or "discharge" so brought about was without cause.

In connection with the foregoing it is also to be noted that the Corporation did not "shape-up" petitioner until an arbitrator had made an award requiring the Corporation to do so. Such award was, by the terms of the collective bargaining contract, "final and binding upon all the parties" to the contract. This award was enforceable in a court of law.

It might be argued that before the Corporation complied with the award, it should have permitted a court to determine whether, under Section 8(c) of the Act, the award was cause for a discharge or "shape-up." This argument loses sight of the fact that the Corporation was under a duty to the nation, and to the government agency from whom it held its contracts to repair United States vessels, to see to it that nothing it did would bring about a cessation of production, and that disregard of the collective bargaining contract to the extent of ignoring an arbitrator's award rendered thereunder would be the most fruitful cause of strikes and work stoppages.

Furthermore, it must be assumed that the Corporation was cognizant of the numerous decisions of the National War Labor Board holding that the right to litigate disputed questions of law was not one to be exercised by an employer during the war emergency. *In re Chicago Transformer Corporation and United Electrical, Radio and Machine Workers, Local 1150*, 14 War Labor Reports 666 (1944).

The petitioner's "shape-up" having been brought about by an arbitrational award of the character and under the circumstances described must clearly be held to have been for cause.

There is still a further ground on which it must be held that petitioner's "shape-up" was for cause. The uncontradicted testimony and evidence in this case shows that the clause of the collective bargaining contract which required that "shape-ups" be made in accordance with the length of service of the Corporation's employees was incorporated in such contract by virtue of the Directive Order of the National War Labor Board dated February 25, 1944 (R. 67; Defendant's Exhibit "A"). Such Directive Order was issued pursuant to the authority and the power granted to the National War Labor Board by the War Labor Disputes Act of June 25, 1943, Public Law 89, 78th Congress, First Session.[1] At the time petitioner was "shaped up" it was common knowledge throughout the length and breadth of the country that in numerous instances failure on the part of an employer to comply with a Directive Order of the National War Labor Board and with the terms of a collective bargaining contract embodying such Order had been followed by governmental seizure of the employer's plant. It must be assumed that this employer also was possessed of this knowledge.

It must further be assumed that the employer was equally familiar with the numerous decisions of the National War Labor Board holding that Section 8 (c) of the Act did not

[1] Sec. 7 (a) of this Act provides: "The National War Labor Board * * * shall have the following powers and duties:

"(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of * * * the National Labor Relations Act: * * *"

grant to a restored veteran any greater seniority than required by the collective bargaining contract, and did not set aside the seniority provisions of a collective bargaining contract: *In re Sullivan Dry Dock and Repair Corporation and Local 13, I. U. M. S. W. A.*, 14 War Labor Reports 283 (1944); *In re Scoville Manufacturing Co.*, 21 War Labor Reports 200 (Dec. 19, 1944); *In re Bendix Aviation Corp.*, 21 War Labor Reports 145 (Jan. 19, 1945).

Thus the employer, in "shaping up" the petitioner, was acting pursuant to the mandate of a federal agency created by the President and the Congress, and clothed by them with authority in the premises through Executive Order and statutory enactment flowing to an equal extent with Section 8 of the Act out of the constitutional war powers. It must be held that the "shape-up" so brought about, if it was a "discharge," was for ample cause.

## III

**Neither the Legislative History of the Act Nor the Interpretations of Section 8 (c) Thereof Issued by the Director of Selective Service in Memorandum 190-A Support the Petitioner's Claim to a Preference in Employment in the Face of the Failure of the Act's Clear Language to Grant Such Preference.**

In the court below petitioner laid great stress upon the Congressional intent, as expressed in the debates and Committee consideration of the Act, and as indicated by the fact that Congress, in 1944, extended the life of the Act after knowledge that the Director of Selective Service had expressed the same opinion concerning the meaning of Section 8 as the petitioner ascribed to it. Petitioner further urged upon the court below that it should give determinative weight to such opinion of the Director of Selective Service. It is our purpose to show that neither of these

contentions of the petitioner should prevail over the clear and unambiguous language which Congress used in Section 8.

1. *The Legislative History of the Act Does not Support the Petitioner's Contention.*

The perspective in which the history of the Act must be viewed is aptly expressed in the majority opinion of the court below (R. 185):

> "When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly insisted that no troops should be sent overseas. The original act limited service to one year, and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September, 1941. Congress was calling young men to the colors to give the man adequate preparation for our defense, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; but we have not to decide

what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which § 8(b) and § 8(c) were cast."

The petitioner's brief in the court below quoted a number of statements made by participants in the Congressional debates which would seem to afford some foundation for his contention. However, equally numerous statements by Congressmen and Senators are to be found which, with as great a degree of cogency, support the opposite view. The truth of the matter, as a reading of the debates and of the Committee hearings will demonstrate, is that relatively scant attention was given by Congress to Section 8 of the Act.[2]

The difficulty with the argument advanced by petitioner and the opinions expressed by the Director of Selective Service is that they represent thinking appropriate to a time when countless sacrifices of life and limb had been made during years of a cataclysmic war, and when sympathy for, and gratitude to, the veteran were boundless and made almost any reward that might be granted to him seem inadequate. Furnishing a reward to the battle-scarred veteran of foreign wars was not, however, the function of the Act; its purpose was primarily the training of civilians for military service rather than provision for problems that would arise after termination of the war.

"To hold that Congress was intending by this Act to confer such an advantage [as absolute work priority] to the serviceman, in my judgment, goes beyond the express provisions of the Act and would not be warranted under ordinary rules of construction. Congress by a later Act, World War II, Servicemen's Readjustment Benefits (G. I. Bill of Rights) 38, U. S. C. A. 693, et seq., conferred advantages on the serviceman far beyond the civilian. By the Selective Service and

[2] See 54 Yale Law Journal, 417 at 418, Note 8.

Training Act, however, they were undertaking to establish the machinery for a 'fair and just system of selective, compulsory military training and service' and to that end provided in Section 8 of the Act that no handicaps should be placed on one in his employer-employee relationship by reason of his leaving his employment for military service. His status quo with accumulated seniority was provided for and definitely preserved; he was to suffer no handicap in his employment relation by reason of his military service; in short, he was to get his own job back if it was in existence—not to get the job of another with longer years of service. • • • The argument goes that it was thus the intention of Congress to give the returning veteran an advantage over his former fellow workmen and that such advantage is no more than a just reward for a patriotic service nobly performed. Without minimizing the great respect and lasting obligation all are under to those who bore the brunt of military service, yet we are not to be carried away in this hour of triumph, and in our zeal to show our appreciation to the returning veteran perforce to be led into a construction of the Act that holds such potentialities of chaos in industrial relations."

*Olin Industries, Inc.*, v. *Joseph Barnett, Roy Slaten, et al.*, decided January 24, 1946 (U. S. D. C. S. D., Ill.)

The considerations and sentiments which move petitioner and others who hold with him to press for the adoption of their interpretation of Section 8 of the Act were not those which motivated Congress when it enacted the Statute; to read such considerations into the Congressional debates and to argue that they indicate the intention ascribed to Congress by the petitioner is anachronistic. At best, this phase of petitioner's argument is an attempt to obtain by the short-cut method of judicial leigslation rewards for the veteran which Congress has not enacted.

*2. The interpretations of Section 8(c) of the Act contained in Local Board Memorandum 190-A have no legal status, are contrary to the language and the legislative history of the Act, would make the Act conflict with other laws, and should be given no weight by the Court.*

We have already indicated that the only support for the petitioner's contention emanating from any official or semi-official source is apparently Local Board Memorandum 190-A. We shall now turn to an examination of the weight, if any, which this Court ought to lend to such Memorandum.

It is to be remembered, in the first place, that the Director of Selective Service is not charged with the enforcement of Section 8(c) of the Act, and has no power or responsibility with respect thereto, except "to render aid in the replacement in their former position of, or in securing positions for" veterans. In the fulfillment of the latter function, the Director of Selective Service is given no power to make rules for the administration, or to make interpretations of the Act (Sec. 8 (g) of the Act.)[3]

Where an agency issuing interpretations of an Act has no implied or express statutory authority so to do, it is well settled that such interpretations would carry little weight in the courts. *United States* v. *Stewart*, 311 U. S. 60 (1940). Similarly, informal interpretations of an Act, such as those contained in Memorandum 190-A, are relied on only to a very slight extent, if any, by the Courts. *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455 (1934).

Nor were the interpretations contained in Memorandum 190-A contemporaneous with the enactment of the legis-

[3] Indeed, Selective Service Headquarters concedes as much, since Memorandum 190-A, Section 1, states that "interpretation of the meaning and significance of [the reemployment] provisions is, in the last analysis, a matter for determination by the courts".

lation, Memorandum 190-A having been issued more than three and one-half years after passage of the Act. This delay in the issuance of Memorandum 190-A, and of the informal interpretations contained therein, places the Memorandum outside of the normal rule that administrative interpretations issued contemporaneously with the enactment of a statute are to be given weight by the courts, and makes applicable the principle that the failure of an administrative agency to assert authority to issue rules and interpretations is a significant indicator that authority to do so was never actually conferred. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 352 (1941).

On these grounds alone it is respectfully submitted that your Honorable Court should not accept the interpretations contained in Memorandum 190-A.

It might be argued that even though, under the foregoing authorities, the Court is not constrained to give major weight to the interpretations contained in Memorandum 190-A, nevertheless the Court should in part at least be guided by these interpretations as coming from an agency which presumably must have made expert study and attained large experience of the problems arising out of Section 8(c) of the Act, by virtue of the fact that such agency is entrusted with the duty of aiding veterans in obtaining their rights under the Act.

On a number of grounds such argument will not bear scrutiny. Selective Service Headquarters cannot have had any extensive experience with problems of administering Section 8(c), because it is only recently that veterans in any large numbers have been released from the armed forces. Again, the interpretations upon their face show a lack of thoughtful, objective, and careful study of the problems involved. Thus, sub-section (b) of Section 4

of Part IV of Memorandum 190-A, upon which petitioner places his reliance in this case, reads as follows:

> "(b) A veteran who has been reinstated to his former position cannot within one year be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his reemployment rights under the act, and would be, in effect, a repeal of an Act of Congress."

It is obvious that this interpretation cannot be uniformly applied; it contains within itself the seeds of unresolvable conflict. Suppose, for example, that two veterans of a given employer originally hired at different times, and restored to their positions at different times, find themselves in a situation, within one year of their restoration, where the work available for them in the employer's plant is sufficient to keep only one of them fully employed. Under the above quoted sub-section of Memorandum 190-A the greater seniority of one veteran could not be used as a criterion for determining which veteran was to be retained in employment. The selection by the employer of either veteran for retention in his position would give rise to a claim by the other that he had been deprived of his reinstatement rights without cause.[4]

The contradictory character of the interpretations contained in Memorandum 190-A is particularly marked when those interpretations are sought to be applied in the instant

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[4] Numerous additional frailties in, and impossibilities of uniform application of the interpretations of Memorandum 190-A could be pointed out. For some of these examples, as well as for a discussion of other frailties of Memorandum 190-A, see the brief amicus curiae, filed in this case by the Congress of Industrial Organizations.

case. Sub-section (a) of Section 4 of Part IV of Memorandum 190-A reads as follows:

> "4. Employment for one year.—(a) A veteran entitled to reemployment may not be discharged from his restored position 'without cause within one year after such restoration.' What is 'cause' for dismissal in any case must be determined by the facts and circumstances in each case. The question is to be determined by standards of common sense and is to be measured by practices and customs generally acceptable in industry or practices and customs in common and accepted use in the particular place of employment."

The petitioner's contention in this case boils down to an argument that his "shape-up" was a "discharge", and that that discharge was without cause. Yet the above quoted subsection clearly states that what constitutes cause for discharge is to be determined by standards of common sense, and is to be measured by practices and customs generally acceptable in industry or in the particular place of employment. Thus, even if it were conceded that a "shape-up" is a discharge, subsection (a) of Memorandum 190-A would itself deprive the petitioner of any right of action. For the "shape-up" and the use of seniority to determine the order in which employees are to be "shaped up" are shown by the uncontradicted testimony and evidence in this case to be "practices and customs generally accepted in industry" and "in common and accepted use in the particular place of employment" of this petitioner. Yet subsection (b) would require that these generally accepted practices and the accepted usage in the petitioner's place of employment should not be held to be good cause for his "shape-up".

Common sense would dictate that interpretations so inconsistent and illogical, and so incapable of uniform application should be rejected by the courts as guideposts

of statutory construction. In this instance, common sense is supported by judicial authority. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1 (1932); *McCann* v. *Retirement*, 331 Ill. 193, 162 N. E. 859 (1928); *Skidmore* v. *Swift*, 323 U. S. 134.

* * * * * * *

The interpretations of a statute issued by an administrative agency are, under the commonly accepted rule, accorded weight by the Courts where the statutory provisions, interpreted are ambiguous, and where such interpretations would be consistent with the general legislative purpose or scheme revealed by the statute. It is respectfully submitted that in this case the facts and circumstances are not such as to permit this rule to be brought to the support of petitioner's effort to have this Court adopt the interpretations of Memorandum 190-A. The chief reason is that Section 8(c) of the Act is not ambiguous; added to this is the fact that the interpretations are not consistent with the legislative scheme or purpose revealed by the Act.

What has already been said at pages 9 to 14 above demonstrates, we believe, that there is no ambiguity in Congress' use of the word "discharge" in Section 8(c) of the Act. The C. I. O.'s brief amicus curiae ably demonstrates that the general scheme which Congress had in mind for the reemployment of veterans was to afford such veterans preservation of the job advantages and rights which existed at the time they entered the armed forces.[5] That this was Congress' purpose is also demonstrated by the legislative history of the Act, as discussed in the brief amicus curiae of the C. I. O.

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[5] In this connection see also Professor Herman L. Gray's arbitral award and opinion in the case of *Timken Roller Bearing Co. and United Steel Workers of America*, 16 War Labor Reports 482.

Memorandum 190-A itself clearly shows, however, that it seeks to gain for the reinstated veteran greater advantages and rights. Thus, the interpretations contained in Memorandum 190-A need not be adverted to by the Court, since the statute is unambiguous. If the interpretations are adverted to by the Court, they should be disregarded, since those interpretations are contrary to the clearly indicated legislative purpose. Memorandum 190-A indeed seeks to ascribe to Congress a purpose whose mere mention is revolting to any sense of justice, and which Congress itself would be the first most vehemently to disavow. In sub-section (B) of Section 8(b) of the Act Congress showed its solicitude not to impose upon the veteran's employer the burden of furnishing employment if the employer's circumstances had changed so as to make it unreasonable to require restoration of the veteran to his position. Memorandum 190-A, however, would have the Court hold that Congress had no such solicitude for non-veteran employees, since upon them—rather than upon the employer or society as a whole—would be imposed the burden of giving employment to the veteran by surrendering their own means of earning a livelihood for themselves and their dependents. Congress and the President, through governmental agencies such as the War Manpower Commission, required the non-veteran employee to contribute to the war effort by remaining at his war-production tasks. This contribution to the war effort was in hundreds of thousands of instances accompanied by loss of life and limb, just as was support of the war effort through service in the armed forces. It would indeed be a strange kind of justice which would prescribe that citizens who supported the war effort in one manner required by Congress shall be punished for so doing by having shifted to them, from the shoulders of society as a whole and of the employer, the burden of subsidizing, through surrender of their jobs, other citizens

who supported the war effort in another manner prescribed by Congress. Such discriminatory treatment as between the employer and the non-veteran employee cannot and should not be ascribed to Congress and to the Act. Such discrimination would result in injustice and undue hardship, and this Honorable Court should, therefore, not adopt the interpretations contained in Memorandum 190-A. *United States* v. *Jackson*, 280 U. S. 183.

A further reason why this Honorable Court should not adopt the interpretations of Section 8(c) of the Act set forth a Memorandum 190-A is that to do so would bring the Act into conflict with, or require that it be considered an amendment of other federal laws governing employment relations or constituting exercise of constitutional war powers, such as the National Labor Relations Act and the War Labor Disputes Act, respectively. It requires no citation of authorities to demonstrate that the rules of statutory construction uniformly require that an interpretation of a statute which would have such a result should not be adopted, if there is available another reasonable interpretation free of such consequences. The possibilities and probabilities that the interpretations contained in Memorandum 190-A would lead to conflict between Section 8(c) of the Act and other federal laws are so ably demonstrated and documented in the Yale Law Journal article cited above that it would be a work of supererogation to treat of that subject here. The Court's attention is invited particularly to pages 425-430 of said article and to the footnotes appearing on those pages.

To the foregoing reasons why this Honorable Court should not adopt the interpretations of Section 8(c) of the Act contained in Memorandum 190-A, could be added many more. Among these would be that these interpretations are not concurred in by other governmental executive and administrative agencies of equal status with Selective

Service Headquarters in the field here involved; that considerations of public policy preclude the disruption, during this critical period of conversion from a war to a peace economy, of established industrial practices, which would result from adoption of these interpretations; and that veterans should not be deprived, as they would be under these interpretations, of the many advantages which adherence to Congress' intent, expressed in Section 8(e), to grant to veterans the protection of seniority as established in collective bargaining contracts, would afford to the veterans. The foregoing considerations have, however, been fully and ably treated in the Yale Law Journal article; they will, hence, not be repeated here. In any event, these considerations are so cogent as themselves to require rejection of Memorandum 190-A as a guide to the proper interpretation and application of the Act.

## Conclusion

For all of the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

M. H. GOLDSTEIN,

*Attorney for Respondent, Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O.*

## APPENDIX A

Section 8(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety[6] days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year— * *

(A) If such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status and pay;

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on fur-

[6] At time plaintiff applied for reemployment this read forty days.

lough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

* * * * * * *

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in he replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act.

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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# No. 970

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ABRAHAM FISHGOLD,

*Petitioner,*

*vs.*

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C. I. O.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND DISTRICT

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## REPLY BRIEF OF ROY GRANATA, ETC., RESPONDENT

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M. H. GOLDSTEIN,
*Counsel for Roy Granata, etc., Respondent.*

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# SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## REPLY BRIEF OF ROY GRANATA, ETC., RESPONDENT

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This brief, filed by leave of the Court granted at the time of argument, is intended as a reply to the suggestion, made for the first time[1] in the brief filed in this Court by the

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[1] In the court below petitioner made no such contention, and no mention of such a contention is to be found in his petition for a writ of certiorari. The specification of errors, included in the Solicitor General's brief, at page 7 thereof, in accordance with paragraph 6 of Rule 27 of this Court, also does not raise the point.

Solicitor General on behalf of the petitioner, that neither the court below nor this Court has jurisdiction in this cause.

## Summary of Argument

The intervening Union's property rights in and under the collective bargaining contract between the Union and the respondent Corporation would have been diminished and curtailed by the plaintiff's success in the district court, since such success could be based only upon a holding that the seniority provisions of such contract were not binding upon the employer defendant, the plaintiff, or other employees similarly situated. This gave the Union a sufficient interest to intervene; having on these grounds been permitted to intervene, and having submitted for adjudication its claim that its contract was binding upon the original litigants, the Union became a party for all purposes, including that of appealing from the district court's judgment. For that judgment adversely affected the Union's rights by not only absolving the employer from compliance with the seniority provisions of the contract under certain circumstances, but, indeed, by punishing him and threatening him with future punishment for compliance therewith.

The intervening Union's actual status in the district court was, in relation to the plaintiff, that of defendant; in relation to the employer defendant, that of a plaintiff. Since the money judgment against the employer was perforce based upon an adjudication of the Union's rights and the employer's obligations under the collective bargaining contract, the Court's judgment, though not in terms, ran also against the Union's asserted rights. Those rights were permanently diminished, since the Union, having submitted its interest in the collective bargaining contract to consideration and adjudication by the district court, was prevented either by the doctrine of estoppel or of res

*judicata* from relitigating this question with the employer. Accordingly, the case did not, as to the Union, become moot by reason of the expiration, prior to the appeal to the court below, of the period of one year from the date of the plaintiff's restoration to his position.

## ARGUMENT

### I

### Respondent Union Had Sufficient Interest as an Intervener in the District Court to Support an Appeal from the Judgment Entered Therein

In 10 Cyc. of Federal Procedure (2nd edition), Sec. 5006, the rule is thus stated:

> "Persons who have been allowed to intervene in a suit become parties thereto with all the rights and privileges which attach to the relation, including that of prosecuting an appeal from the judgment or decree which affects their legal interest. * * *"

The rule is similarly stated in Moore, *Federal Practice*, section 24.11, p. 2371:

> "The intervener, once intervention has been allowed, has the right to appeal from all interlocutory and final orders which affect him, and from which an appeal is given by statute, whether the right under which he intervened was originally absolute or discretionary. * * *"

The interest of the intervening Union in this dispute does not arise out of a mere general economic interest, as in *Alexander Sprunt & Son.* v. *United States*, 281 U. S. 249; nor out of a mere interest in having a desired rate prevail, as in *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577; nor out of a mere interest in having an advantageous

precedent established, as in *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632. Nor did the decision of the district court fail to affect the intervener and its members or their rights, as in *International Brotherhood* v. *Keystone Freight Lines*, 123 Fed. (2d) 326 (10th Circuit).

What supported the intervention of the Union in the district court was the claim of the plaintiff therein that the contract between the Union and the Corporation did not constitute a bar to his recovery. Paragraph "Fifteenth" of the complaint (R. 6). The intervener, of course, maintained that its collective bargaining agreement with the Corporation, entered into pursuant to the National Labor Relations Act, was binding upon the employer corporation and the plaintiff, was consistent with the provisions of the Selective Training and Service Act, required that the plaintiff be "shaped up" in accordance with his seniority standing, and precluded recovery by the plaintiff. Answer of Intervener, paragraphs 8 to 14 and 17 to 19 (R. 9-13). Thus the actual issue in litigation among all parties was the interpretation of the collective bargaining agreement and the extent of its effectiveness in the light of the Selective Training and Service Act and no judgment could have been rendered in the plaintiff's favor if the intervening Union's and the defendant's contentions were correct.

The Union's interest in the collective bargaining agreement and in the litigation, was both that of a principal acting to protect its own property rights under such agreement, and that of a statutory representative of the other employees of the corporation, whose property rights of seniority under the agreement were endangered by the plaintiff's claim. If traditional criteria of what constituted the property rights of the Union must be found, they will be seen to flow from the fact that a collective bargaining

agreement forms the foundation of effective representations by the union that employees should, in order to obtain beneficial conditions of employment and equality of treatment from the employer, join the Union and thus designate it as their collective bargaining representative. When the conditions of employment spelled out in a collective bargaining agreement are made inapplicable to a certain class of employees, the Union's ability effectively to solicit and obtain membership and to function as a bargaining agent is reduced.

By awarding damages to the plaintiff, the district court decided that the collective bargaining agreement either did not have the meaning contended for by the intervener and the employer, or that it was not binding upon the employer. Indeed, the effect of the district court's determination of the dispute was to penalize the employer for having observed its contract with the intervener by requiring it to pay damages to the plaintiff. The judgment of the district court thus clearly affected the legal interest of the intervener in such a manner as to permit the intervener to appeal therefrom. Whether or not the district court issued a judgment declaratory in form is not, and should not be, determinative of the intervener's right to appeal. The fact is—notwithstanding its form—that the judgment was declaratory of the rights of the Union.

In conferring upon the plaintiff a right to recover money damages, the district court thereby nullified the duty of the employer, formally stated in its agreement with the Union, to lay off, when it became necessary, those who are junior in length of service. If the duty of the employer, as was decided by the district court, was to give continuous actual work to the plaintiff, then the duty of the employer to the Union cannot exist, for they are mutually exclusive. Yet the existence of such a duty to the plaintiff was clearly

expressed by the award to him of money damages for the days on which, in accordance with the collective bargaining agreement, the Corporation laid him off. Such a determination by the district court, erasing as it did the duty of the Corporation to the intervening Union, obliterated equally the correlative right enjoyed by the intervener. The judgment must, therefore, be regarded as so affecting the legal interest of the intervening Union as to support its right to prosecute an appeal therefrom.

It is clear from the record that the intervening Union submitted for judicial determination its claim that the collective bargaining agreement bound both the plaintiff and the defendant. The intervener's proposed findings of fact and conclusions of law (R. 155 *et seq.*) placed squarely before the district court the necessity for determining the effect and validity of the collective bargaining agreement. Particular reference is made to the Intervener's Proposed Conclusions of Law II, III and IV (R. 163-163). The failure of the district court to make these conclusions (R. 171-173) may fairly be regarded as a refusal so to conclude. This refusal had the effect of a denial by the district court that the plaintiff's seniority and his rights pursuant to such seniority were such only as provided in the collective bargaining contract (Intervener's Proposed Conclusion of Law II—R. 163); a denial that the defendant's failure to assign plaintiff to work on the days in question was in conformity with and required by the collective bargaining contract (Intervener's Proposed Conclusion of Law III—R. 164); and a denial that, if the failure to assign the plaintiff to work was a discharge within the meaning of the Act, it was a discharge for cause, said cause being (a) the obligation of the defendant to comply with the provisions of the collective bargaining contract, (b) the obligation of the defendant to comply

with the arbitration award interpreting the contract (Intervener's Proposed Conclusion of Law IV—R. 164-165).

Having thus submitted its claims for judicial determination, the intervener undeniably was in a position to appeal from the judgment, which was adverse to its interests. Cf. *City of Savannah* v. *Jesup*, 106 U. S. 563. The judgment was adverse to the intervening Union's interests because it was grounded upon, and could not have been reached without, a denial of validity to relevant provisions of the collective bargaining contract.

The very permission to intervene, granted to the Union (R. 48), itself indicated that the Union had rights which would be, and were, affected by the judgment. Where it has been thought best to allow a party to intervene and to be heard it is unreasonable to refuse him the right to appeal. *In re New York Investors*, 79 F. (2d) 179 (Second Circuit). If the intervener was in a condition to contend in the district court, if was in a condition to appeal. *Ex Parte Jordan*, 94 U. S. 248. Even where the right to intervention is questionable—and in this case it has not been disputed—once a party has been permitted to intervene, he becomes a real, not merely a nominal, party and, as such, is entitled to appeal. *Texas* v. *Anderson, Clayton & Co.*, 92 F. (2d) 104 (Fifth Circuit).

Nor is it true that, in order for an intervener to have a right to appeal, the judgment must assess damages specifically against the intervener or specifically enjoin him. In *Securities & Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, this Court held that where the Securities and Exchange Commission had properly been allowed to intervene, the Commission was a "party aggrieved" by the Court's order *refusing to dismiss* the proceeding and was entitled to appeal. The petitioner in the instant case contends that the S. E. C. was

permitted to appeal because of the public interest which it is its duty to protect. A reading of the decision reveals, however, that, while this was the ground for allowing the Commission to intervene, it did not determine the right to appeal once intervention was permitted.

*Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 Fed. 494 (Ninth Circuit), cited by the petitioner, is not in point. It held that the trustee named in a corporate mortgage, *who had been fully paid and whose cause of action had been fully and completely discharged of record*, had no appealable interest in a suit by an employee of the corporation to obtain a lien upon the corporate property, because the trustee had parted with whatever rights it had in the property and could not be prejudiced by subsequent proceedings and because the trustee was not interested in appealing to avoid liability for a deficiency in funds since it was not liable for any such deficiency. In the *Hamilton Trust Co.* case there was no decision rendered which was adverse to the trustee. The petitioner's rights and claims had been fully satisfied and it is altogether reasonable and just that the trustee should have had no right to appeal from a decree creating a lien upon property in which the trustee no longer had any interest. But this lack of interest to be affected certainly cannot be predicated of the Union in the instant case. The Union's contract with the Corporation, which was the *continuing and subsisting* embodiment of the rights and duties of the respective parties, could not, after the district court's determination, be regarded as binding with respect to the duty of the Corporation, when necessary, to lay off returned servicemen in accordance with the procedure set forth therein. Thus, while in the *Hamilton Trust Co.* case the trustee was seeking to appeal from a decree which was not adverse to the trustee, in the instant case the Union appealed to the circuit court from a judgment which was clearly adverse to the Union.

## II

### There Existed, at the Time of Appeal, a Case or Controversy Which the Circuit Court Could Decide

The petitioner contends that no interest of the Union could have been affected by the judgment of the circuit court and that, therefore, the controversy had become moot. The basis of the petitioner's contention is that, after the expiration of the statutory year, there was nothing against which the judgment prayed for could operate. The money judgment against the Corporation, contends the petitioner, did not adversely affect the respondent Union.

The petitioner overlooks the real problem and takes for granted that the only controversy of the intervening Union in the district court was with the plaintiff. That, however, was not the fact. The Union intervened as a defendant because it was trying to prevent the plaintiff from obtaining a recovery from the Corporation, since a recovery by the plaintiff would effectively invalidate the disputed provision of the collective bargaining agreement. The position of the Union was as adverse to the corporate defendant as it was to the plaintiff. The Union's appellation as a defendant was merely one of convenience; the Union was a plaintiff, as far as the corporate defendant was concerned, because the corporate defendant had previously disregarded the contract between them and had been ordered by an arbitrator to comply therewith. The Union was thus contesting the opposition of the Corporation as well as the Corporation's asserted neutrality (R. 52): It was attempting to obtain from the court a type of judgment which would require the Corporation to comply with its contract. In rendering a money judgment against the corporate defendant, the district court dismissed what was, in effect, the Union's complaint against the Corporation. That dispute still exists and if, as will be shown, the dismissal of the

Union's complaint is *res judicata*, the Union is forever precluded from effectuating its contract with the corporate defendant. This means that there was in existence, at the time the Union appealed to the circuit court, a judgment which affected its rights and which, if unreversed, would continue so to affect them. The passage of one year from the date that the plaintiff was entitled to be restored to his position is totally irrelevant to this dispute and does not render it moot. The question of the validity of the contract then persisted and now persists. In respect of that question the Union's rights were clearly and tangibly in issue and subject to being affected.

> "A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the cause of action in the two suits be identical or different." Black, *The Law of Judgments*, 2nd Edition, Sec. 504, p. 764, and cases cited in footnote 9.
>
> "Numerous cases show that a judgment may be binding as an estoppel upon a person who submitted his interest in the subject-matter of the litigation to the consideration of the court and invited its adjudication thereon." *Idem*, Sec. 541, p. 821, and cases cited in footnote 226.

In *Burlen* v. *Shannon*, 99 Mass. 200, the Supreme Court of Massachusetts stated:

> "The estoppel is not confined to the judgment, but extends to all steps involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the bases upon which it stands, upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion."

Thus, necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. See Black, *The Law of Judgments*, 2nd Edition, Sec. 613.

Lest there be any doubt that the district court's determination rendered the contract between the Union and the Corporation, insofar as it was in issue, invalid and would constitute a defense on the part of the Corporation to any future suit brought by the Union with respect to such issue, the following quotation from an outstanding authority on the law of judgments should make this point clear:

> "* * * The doctrine of res judicata does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried,—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now these conditions are fully met when any question, though foreign to the original issue, becomes the decisive question, the turning-point in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject-matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment, as if it stood alone as the issue in the case. For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not. * * *" Black, The Law of Judgments, 2nd Edition, Sec. 614, p. 936.

The point actually litigated in this case was the validity of the contractual provisions between the Union and the Corporation which stipulated that employees with the

least length of service with the employer shall be the first laid off when a decrease in working force becomes necessary. That point was decided adversely to the Union by the judgment of the district court. If passage of the statutory year were to be regarded as having rendered the cause moot and if, as is obvious from the above-quoted portions of Black's treatise on judgments, the judgment, while unreversed, could effectively bar the Union for all time from seeking an adjudication of its rights under the contract, the Union would thus forever be unjustly deprived of its contractual rights. Obviously, therefore, there *was* something against which the judgment prayed for could operate, namely, the Union's contract and the Union's and its members' rights thereunder. The contract, having been in existence at the time the appeal was taken to the circuit court, and being still in existence, the adjudication of the rights of the parties under the contract still exists. Such a case is not moot but is entirely within the jurisdiction of the federal courts as a "case of controversy" within the meaning of Article III, Section 2 of the Constitution.

## Conclusion

For all of the foregoing reasons it is respectfully submitted that the court below had jurisdiction in this cause and that its judgment should be affirmed.

M. H. Goldstein,

*Counsel for Respondent, Roy Grantata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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# No. 970

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ABRAHAM FISHGOLD,

*Appellant,*

*vs.*

SULLIVAN DRYDOCK & REPAIR CORPORATION,

*Appellee,*

ROY GRANATA, ETC.,

*Intervenor-Appellee.*

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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## BRIEF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

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## BRIEF OF AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

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### Argument

The American Federation of Labor has asked and received permission from the parties to this cause to file a brief *amicus curiae.*

The principal issue in this case is whether Section 8 of the Selective Training and Service Act confers upon returning veterans an absolute priority or superseniority reemployment right to the particular job which the veteran left when he entered the Armed Services, even to the exclusion of other employees with greater seniority. The Gov-

ernment, appearing on behalf of the veteran in this case, contends that such superseniority exists, not only in respect to the right of reemployment in the first instance, but in respect to the right to remain on the job for a year period following such reemployment. The interpretation placed upon Section 8 by the Government would operate to wreck existing seniority practices as established under thousands of collective bargaining agreements in effect between employers and numerous labor organizations affiliated with the American Federation of Labor. Because of this and because of the disruptive consequences inevitable under an adoption of the interpretation placed upon Section 8 by the Government, the American Federation of Labor has a very real and a very urgent interest in presenting its views concerning the proper construction of Section 8. The American Federation of Labor had instituted a suit before Judge Charles G. Briggle, United States District Judge for the Southern District of Illinois, Southern Division, for the purpose of securing an interpretation of Section 8, in an action entitled "*Olin Industries, Inc., v. Joseph Barnett, et al.*" (decided January 24, 1946). That Court upheld the contentions of the American Federation of Labor in the first decision to deny the so-called "superseniority interpretation" of the Director of Selective Service. That case is now being appealed to the Seventh Circuit. However, it appears that the principal issue therein will be determined by this Court in the instant case prior to the time that the *Olin* case can be presented to this Court, and for that further reason the American Federation of Labor desires to present its views in the present action.

**Section 8 Does Not Confer Any Absolute Priority or Superseniority Reemployment Right But Merely Restores the Veteran to the Same Relative Position He Would Have Occupied Had He Never Entered the Armed Services**

The position of the American Federation of Labor in respect to the superseniority issue and the proper construction of Section 8 is this: The Congress undertook under Section 8 to protect the returning veteran against any economic penalty he might have suffered because of his service in the armed forces, and to this end the veteran was given the right to be returned to the job *status quo* he would have had had he never entered the services, without loss of seniority or other benefits that would otherwise have been his. The Government in this case, as well as the Director of Selective Service in his memorandum 190-A; contend that Section 8 confers rights of seniority in addition to those which he would have had had he never been inducted, and that the returning veteran has an absolute right to the particular job he left, if still available, regardless of whether a person with greater seniority is thereby displaced. In other words, the Government asserts that returning veterans are entitled to be returned to and retained on their jobs even though the total seniority of the veteran who seeks to displace a non-veteran, including all time spent in the Armed Services, is less than that of the non-veteran. The non-veterans assert that the veterans are entitled to be credited with all time spent in the service of their country just as if they had never left their jobs, but are entitled to no greater credit and to no higher rights. If the Selective Training and Service Act does not confer any right of superseniority, then it follows that the Government's contentions must fall. It is the purpose of this brief to demonstrate that Section 8 of the Act does not confer any

such right, and that Congress did not intend, nor could it have intended, to confer any such right.

Under accepted rules of statutory construction, Congressional intent can be ascertained in three ways: First and most conclusively, by the language of the Act itself—the so-called internal evidence; second, by the legislative history of the law, the external evidence; and third, by consideration of the results obtainable under the superseniority interpretation—results which, as will be seen, could hardly have been intended in the absence of specific language clearly compelling such results.

### 1. The Language of the Act

The Act declares that wherever a returning veteran otherwise meeting the requirements of the statute

> "has left or leaves a position, other than a temporary position, in the employ of any employer" (Section 8(b)),

then the employer in question, on receipt of appropriate application,

> "shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." (Section 8(b)(B).)

With respect to the status of an employee so "restored" to "such position," the section goes on to say:

> "Any person who is restored to a position in accordance with the provisions of Paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered

> by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." (Section 8(c).)

It is clear that the statute on its face does not grant any right of absolute priority or superseniority; that is, there is no specific declaration by Congress that the veteran shall be entitled to the particular job he left regardless of existing contracts or practices in respect to seniority. All that Section 8 provides is that the veteran be "restored to a position of like seniority status and pay." Instead of speaking of a preferential treatment, Congress speaks merely of "restoring" to a "position" the veteran "has left," and this "without loss" of seniority. Manifestly, the words used indicate an intention to restore to a status quo, not to confer rights in addition to those which the veteran might have had had he never left his employment or to put him in a referred position as respects his fellow workers.

The word "restore" connotes a return to a previous status; it is defined in Webster's New International Dictionary, as follows:

> "restore–To bring back to, or put back into, the former or original state; To bring back (to); as, to *restore* a person to health; to give reinstatement (to); to put (a person) again in possession (of an office or the like); to put back (into); to convey (to); as, to *restore* a king to the throne."

The following cases adopt the dictionary definition: *Bowman* v. *McLaughlin*, 45 Miss. 461; 486; *Gilwee* v. *Pabst Brewing Co.*, 193 S. W. 886, 888, 195 Mo. App. 487; *Davis* v. *First Nat. Bank of Oakland*, 229 P. 391, 395, 26 Ariz. 621; *Chicago, M. & St. P. Ry. Co.* v. *City of Milwaukee*, 72 N. W.

1118, 1123, 97 Wis. 418; *Town of Hempstead* v. *City of New York*, 65 N. Y. S. 14, 17, 52 App. Div. 182.

The use of the word "position" is equally significant, and it is extremely important to note that Congress, in indicating to what the veteran must be returned, used the word "position" rather than "job." The word "position" is not defined in the Act. Webster's New International Dictionary (Second Edition) defines "position" as follows: "Site; place; station; situation; hence *proper* place; *relative* place, situation or standing" (Emphasis supplied); it connotes a relative standing existing independently of the presence of the person in it. *Risley* v. *Bd. of Civil Service Com'rs of City of Los Angeles*, 140 P. (2d) 167, 169, 60 Cal. App. (2d) 32; *Smith* v. *School District No. 18, Pondera County, Mont.*, 139 P. 8d 518, 521.

Thus, the concept of a "position" involves a relationship as between the employer and employees and as between employees themselves, all as provided for in the existing collective bargaining agreements or practices then in effect. It is a continuous relationship which carries through periods of layoffs, illnesses and furloughs, and does not signify an actual physical employment at a particular job.

Finally the use by Congress of the negative phrase in subsection (c) of Section 8 that a veteran shall be restored "without *loss* of seniority" (emphasis supplied) would seem clearly to indicate that Congress did not intend to confer any additional or superseniority rights.

It is apparent that Congress intended not that the veteran has the right to be returned to a specific, identifiable job, but rather that the veteran be returned to the same relative position that he had with the employer when he left the employer's service to enter the Armed Forces—in other words, that Congress intended to confer a return to a job right as distinguished from return to a particu-

lar job. Under such a construction, the veteran would be preserved from any prejudice that might have resulted by reason of his induction or enlistment into the Services, and would be restored to exactly the same position that he would have occupied had he never entered the Armed Forces. The assurances contained in Section 8(c) that the veteran upon return "shall be considered as having been on furlough or leave of absence," and shall lose no seniority was clearly to safeguard any veteran returned to a position in a plant where either no collective bargaining agreement or practice conferring full seniority rights was in existence. Thus, the possibility that the term "position" if taken to mean "relative position" or to mean "job right" might operate to the veteran's disadvantage in situations where no seniority agreements or practices were in effect, is fully avoided.

It is argued that the fact that Congress, under subsection (c), has declared that the restored veteran cannot be discharged without cause for a period of one year indicates that Congress did intend to put the veteran in a preferred position and to confer upon him rights in addition to those he would have had had he never left employment to enter the service. It is a sufficient answer to point out that, if freedom from fear of discharge without cause for a period of one year is an additional right conferred upon veterans, such additional right has specifically been spelled out, while superseniority is not. However, the provision that veterans shall not be discharged without cause for a period of one year, instead of comprising some sort of an additional right, might very well be considered as a means utilized by Congress to prevent circumvention of the primary purpose of Section 8 to restore the veteran to his previous position. Without a provision forbidding discharges, the whole purpose of Section 8 could be defeated by an employer rehiring a veteran one day and discharging

him the next. In any event, the provision against discharges is not at all inconsistent with a restoration to a relative, as distinguished from a super, seniority. Opposing counsel argued that the provision against discharge is clear proof that superseniority must be conferred because ordinary seniority would conflict with the discharge provision in case of layoff in order of seniority. But this argument assumes that discharge is tantamount to layoff, and ignores the distinction between the two, "clearly understood and carefully guarded in industry." See "Veterans' Reemployment Rights," 54 Yale Law Journal 417, at 425.

### 2. The Legislative History

The legislative history of the Selective Training and Service Act, both as recorded in the Congressional debates and in the House and Senate Reports, discloses not one single reference to any intention on the part of Congress to grant any rights of superseniority or to place the returning veteran in a preferred position as compared to his fellow workers. The original Selective Service Bill, introduced by Senator Burke of Nebraska as S. 4164 on June 20, 1940, and by Representative Wadsworth of New York as H. R. 10132 on June 21, 1940, contained no reemployment provisions. Provisions similar to Section 8 were incorporated in the Senate Bill (S. 4164) and subsequently in the final version, H. R. 6215, but little if any consideration was given to such provisions in the Committee. (See Hearings before Committee on Military Affairs on S. 4164, 76 Cong., 3rd Sess., 1940, and Hearings before Committee on Military Affairs on H. R. 10132, 76th Cong., 3rd Sess., 1940.) The reports and the debates, however, did indicate that Congress intended a restoration to the *status quo*—that the veteran should be restored to his position without in any way being penalized by reason of his military serv-

ice. The following excerpts from the Congressional discussion of the legislation are illuminating:

Sen. Danaher: 'Is it meant • • • that if a man goes out to serve his country • • • and comes back he assumes his prior status less one year's payment?'

Sen. Sheppard: 'That is what this bill intends as I understand. That is what the members of the committee thought should be and could be done.' (86 Cong. Rec. 10107 (1940). See also statement of William Green, president, AFL, quoted in 86 Cong. Rec. 10091-2 (1940).)

Chairman May of the House Military Affairs Committee stated:

> "You will find in that amendment Nos. 12, 13 and 14, the House inserted the word 'seniority' relating to a position held by the guardsmen. It is inserted in three places and provides that he shall be restored to his seniority status. In other words, if a man who is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position." (86 Cong. Rec. 10761.)

Subsection (c) was also amended in order to ensure that the seniority rights of the men to be inducted were adequately protected. It was changed to read as follows, the *italicized* portions indicating the added language:

> " 'Any person who is restored to a position in accordance with the provisions of Paragraphs (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces*, shall

be so restored without loss of seniority, *shall be entitled to participate* in insurance or other benefits offered by *the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces*, and shall not be discharged from such position without cause within one year after such restoration.' "

The purpose of this change was explained by Representative May, speaking for the House Committee on Military Affairs which added the amendment, as follows:

> "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement." (86 Cong. Rec. 11762.)

Senator Sheppard, who spoke for the amendment in the Senate, likewise indicated that the change was intended to restore the veteran to the same position he would have been in had he been on furlough or on leave of absence. He said:

> "That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me a good suggestion." (86 Cong. Rec. 10914.)

Senator Barkley, the majority leader of the Senate, in discussing the effect of Section 8 in a case where there is a reduction in force, stated that

> "They might even have fewer regular employees at the end of the year than they had at the time the individual employees entered the service; and

in cases of that sort it seems to me we could not require a company to restore the employment of men, who, if there had been no military service, might have been discharged during the year because of a necessary reduction of the company's force." (86 Cong. Rec. 10108.)

President Roosevelt, whose signature made the Selective Service Act into law, likewise showed a clear understanding that Section 8 was not intended to impose any superseniority rights upon veterans but, on the contrary, seniority practices prevalent in industry were to be preserved and respected. In a statement released on December 8, 1942, he urged employers to preserve the seniority rights of employees shifting to work in war plants. In part that statement read:

"Many workers have over the years accumulated valuable rights to their jobs. Seniority privileges have become an institution in American industry.

"*This was recognized when the Selective Service Act was passed.* It was thought by the Congress only fair that men who gave up their jobs to enter the Army and Navy should have the maximum protection so that when they returned they could step back into their jobs with a minimum of loss. Valuable reemployment and seniority rights are protected under the Selective Service Act. I think *the same protection* should be accorded to a worker wherever possible who leaves his job to accept employment to help with the war effort * * *. I feel that employers in civilian industries will be willing to give the *same assurances to their employees who leave for war work as they are giving to employees who are leaving to join the Armed Services.* (Emphasis supplied.)

It is further greatly significant that the Selective Training and Service Act was passed in time of peace when it was believed that relatively few men would be inducted under it.

and that those who would be inducted would serve only a single year of "precautionary" military training. Thus, the Act was one designed to provide for a uniform and democratic form of conscription and to afford protections against the loss of rights and benefits that would otherwise have existed; the Congress which passed the Act was far more interested in mobilization than in questions which would arise after the war if there was to be a war. It was not the purpose of the Act to reward veterans for their services to their country. This latter object was accomplished under the G. I. Bill of Rights (World War II Servicemen's Readjustment Benefits Act, 38 U. S. C. A. 693, *et seq.*). Since it was through the G. I. Bill of Rights that Congress undertook to compensate veterans for their services to their country, and since the G. I. Bill of Rights does not confer superseniority, it must be concluded that Congress did not intend to confer that preferred status upon veterans at all.

Finally, it is relevant to observe that analogous British and Canadian reemployment statutes do not confer any rights of superseniority but contemplate only a restoration to a *status quo* under existing seniority practices. The British statute provides that

> "it shall not be treated * * * as reasonable or practicable for the former employer to take the applicant into his employment * * * if it can only be done by discharging some other person who * * * had been * * * employed * * * for a longer period than the applicant. (Reinstatement in Civil Employment Act, 1944, 7 & 8 Geo. VI, c. 15, Sec. 5.)

The Canadian Reemployment Act makes "the right to reinstatement * * * subject to established rules of seniority in the employer's establishment * * *" Reinstatement in Civil Employment Act, 1942, 6 Geo. VI, c. 31, Sec. 3.)

### 3. The Results Obtainable Under the Government's Construction

To hold that Section 8 confers rights of superseniority upon returning veterans not only would do violence to the plain language of Section 8, but it would impute to Congress an intent to destroy common law rights and to bring about preposterous and grossly inequitable results. Surely, it cannot be concluded that Congress desired to produce such results in the absence of specific language leaving room for no alternative conclusion; it is a well-accepted principle of statutory construction that enactments in derogation of common law rights or productive of harsh or inequitable results must be specific to that end before an intent to accomplish such results can be imputed. Accordingly, a consideration of the consequences that would ensue were the superseniority interpretation to be given effect is relevant to the question of what must have been the intent of Congress under Section 8.

(a) In the absence of express language Congress cannot be presumed to seek to abrogate standard provisions in respect to seniority rights appearing in perhaps 95% of collective bargaining agreements throughout the country, assuming always, of course, that such seniority provisions confer benefits no less than those specified under Section 8(c) of the Act. If the superseniority construction is given effect, it will mean a scrapping of seniority relationships in industry built up over a period of many years; it will mean the wrecking of every workingman's—whether veteran or non-veteran—most dearly prized right. To millions of workers' rights of seniority by length of service, whether set forth in formal agreements or established as industry practice, represent the very essence of job security. An authoritative study of seniority by the United States De-

partment of Labor (Seniority Provisions in Union Agreements, Monthly Labor Review, May 1941, p. 1167, *et seq.*) has very aptly summed up the development and the importance of the seniority principle in American industry.

"Seniority early became a major issue among the skilled workers on the railroads, where employment ance with length of service. The principal aim of a seniority program is to afford the maximum security and reward to those who have rendered longest service. Also, a definitely established seniority program provides an objective standard of selection thus eliminating favoritism and discrimination in various phases of the employment relation.

"Seniority early became a major issued among the skilled workers on the railroads, whose employment tenure was broken up by frequent transfers and lay-offs caused by consolidation and technological improvements. To overcome complaints of favoritism and discrimination, one of the first demands of the unions, after collective bargaining was established, was the institution of a system of straight seniority in transfer, lay-off, and promotion. The printing-trades unions also were among the first to urge the recognition of seniority, and 'priority rights' were adopted whenever the unions became strongly established * * *

"The growth of mass-production industries and increased union organization during the last few years has made the question of seniority one of the dominant issues in industrial relations. In these industries seasonal fluctuations in production mean frequent lay-offs. Since the great majority of the jobs are semi-skilled or unskilled, most of the workers can be easily replaced, thus increasing the feeling of insecurity. The emphasis on youth and speed in these industries also has tended to cause a feeling of uncertainty of tenure on the part of the older wo. ers * * *

"In spite of these very real problems, both employers and unions have found that the recognition of seniority has distinct advantages. It prevents discriminatory

firing as well as favoritism in promotions. It reduces the number of voluntary quits, since a worker not only hesitates to lose accumulated seniority but also finds it harder to secure employment in another plant where workers have established seniority rights. Although seniority does not eliminate the hazards of unemployment during seasonal decline or cyclical depressions, a measure of job security is obtained. Since a large portion of the working force has reasonable assurance of reemployment at the end of short lay-off periods, they are relieved of the necessity of seeking employment elsewhere. Employers thereby have assurance that a large proportion of their experienced workers will return as soon as business improves. Of major importance is the improved morale resulting from an orderly procedure, carefully planned in advance, and known to all concerned."

The maintenance of a functioning seniority system in a particular industry is indispensable to the peaceful and harmonious functioning of that industry, and any departure from or abrogation of established seniority principles will inevitably operate to the prejudice not only of non-veterans but of the veterans themselves by interfering with the orderly employment of veterans and the preservation of seniority rights indefinitely in the future once they have been employed. The principle of seniority has brought about an orderly reemployment system in American industry. The superseniority interpretation will impair the ability of the veterans to secure speedy reemployment, and in the end the superseniority principle will undoubtedly do the veteran more harm than good by destroying the very system which is the foundation of all job security.

At least two national Veterans' organizations—the Veterans of Foreign Wars and the Disabled Veterans—recognized that in the long run superseniority would harm the veterans more than it would benefit them. Omar V.

Ketchum, National Legislative Representative and Rehabilitation Director of the Veterans of Foreign Wars, in an interview published in "Labor," organ of the Railway Brotherhoods, issue of August 26, 1944, stated as follows:

> "On its face that rule may seem to give a lot of security to servicemen. Actually it's a gold brick. For one thing, it may lead to the dismissal of veterans of the first World War to make room for those of this war. It may lead to fathers being laid off to make room for sons.
>
> "What's most serious is that the ruling would wreck existing union seniority systems—and in the end veterans would thus be left with practically no protection at all.
>
> "The best and fairest method is that provided for in union contracts—under which returning soldiers regain their former seniority, plus accumulated seniority for the time they were in uniform. That means a square deal all around."

In determining whether Congress could be presumed thus to destroy rights of seniority by implication, it is further relevant to note that seniority rights have been held to be property rights in numerous cases. *Evans* v. *Louisville & N. R. R.*, 191 Ga. 395, 12 S. E. (2d) 611 (1940); *Bradford* v. *Kurn & Lonsdale*, 235 Mo. App. 1282, 146 S. W. (2d) 644 (1940) (failure of trustees in bankruptcy to recall a laid-off employee in accordance with contractual seniority rights gives employee a cause of action); *Ledford* v. *Chicago, M., St. P. & Pac. R. R.*, 298 Ill. App. 298, 18 N. E. (2d) 568 (1939); *Gleason* v. *Thomas*, 117 W. Va. 550, 186 S. E. 304 (1936); *Grand International Brotherhood* v. *Mills*, 43 Ariz. 379, 31 P. (2d) 971 (1934). See also *Griffin* v. *Chicago Union Station*, 13 Fed. Supp. 722; *Nord* v. *Griffin*, 86 Fed. (2d) 481; *Estes* v. *Union Terminal Co.*, 89 Fed. (2d) 768. If, as has been held by many court decisions, seniority rights

constitute property rights, such rights cannot be abrogated by implication; the law of statutory construction requires specific language to accomplish results in derogation of common law rights—language completely absent from Section 8.

(b) Congress cannot be presumed to desire to create situations which are contrary to all principles of equity and fair play. The test suit instituted by the American Federation of Labor in Illinois (*Olin Industries, Inc.*, v. *Joseph Barnett, et al.*) involved concrete situations which are illustrative of results which will commonly ensue if the interpretations sought by counsel for the veteran herein is adopted. In the *Olin* case Slader, an employee with 32 years' service with the Company, working faithfully through good times and bad, would be displaced by Bond, a man with three years' service with the Company and employed only during a period of war expansion. Reed who served as Coontz's supervisor, and who taught him his trade, would be displaced by Coontz, even though Coontz has lesser seniority than Reed. Or, to refer to an almost classic example of what will result if superseniority rights are granted, in a plant in New Jersey a wounded veteran of World War I, with thirty years of company service and with a large family, was actually displaced by a Wac who served four months with the Company and three months with the army before she procured a medical discharge. Examples such as these of what would happen were the superseniority principle to be adopted could be multiplied indefinitely; on the other hand, results inequitable to the returning veterans would be few and far between were the principle of equal seniority to govern. Indeed, since in no case could a returning veteran be displaced by some one hired subsequent to the time such veteran entered the Armed Services, and in all cases the

veteran would be accorded credit for all time spent in the Services, it is difficult to see where any inequities would result to the veteran. But be that as it may, it is certain that under a superseniority interpretation, those displaced will be the older employees who for the most part have families to support and have acquired responsibilities considerably greater than the younger veterans. It is precisely these older, less adaptable employees who will find it more difficult than a younger man to make adjustments. In many cases the persons displaced would be veterans of World War I. The mere lapse of time since they made their sacrifices in the national interest—sacrifices equal to those of persons on active military and naval duty in this war—should not be allowed to wipe out their country's debt to them. Wives and parents of soldiers and sailors of this war would also be among those whose seniority rights would be destroyed. The worker who sought to enter the armed forces but was deferred against his will because his services were more valuable to the war effort on the production line will have lost not only his chance to don a uniform but his job as well. All these and many others with equally valid claims to recognition of their seniority rights will be relegated to the status of second-class industrial citizens. Did Congress intend that these employees with long years of service and with family responsibilities are to be uprooted from their jobs and perhaps from the community? In the absence of express language unavoidably producing this result, it can hardly be concluded that Congress did so intend.

Absolute priority will inevitably have a divisive effect by pitting veteran against non-veteran for the available job opportunities. Seniority is one of the worker's most dearly prized rights and they will fight hard to preserve it. It would be unfortunate indeed if, to the inevitable difficulties

of reconversion, there were to be added an economic struggle between veterans and non-veterans.

(c) However great might be the wishes and desires of Congress to give the returning veterans every possible compensation and advantage in return for the inestimable sacrifices made in serving their country in time of war, it cannot be presumed that Congress would intend to give these compensations and advantages at the cost, not of the general public, but of a limited class of private individuals, namely, the older worker who, through no fault of his own, remained on the job at home. It is to be remembered that many war workers attempted to enter the Services, but were told by their Selective Service Boards that they could do more for their country by remaining on the job. In any event, under the workings of the Selective Service System, it cannot be said that any person deemed by this country necessary to be included among the fighting forces was not so included. No reasonable person can deny that returning veterans are entitled to every possible consideration and advantage upon their return to civil life, including, if need be, freedom from economic competition for a period of one year. However, no reasonable person can insist that the burden of thus compensating the returning veteran should be borne only by a limited class of private individuals, namely, those war workers who will be displaced if the veteran is given an absolute right to a job for a period of one year. Surely, anything that it might cost to grant the veterans all possible benefits and advantages should be shared by all of the people of this country. That is the traditional way of American democracy, and it cannot be assumed that Congress would intend any method of compensation the cost of which would not be shared by all alike.

(d) It cannot be presumed that Congress would seek to disrupt our domestic economy and seriously interrupt the reconversion program by requiring industrial organizations to displace their trained and proven workers with those who were for the most part newly hired, and who for the most part are unskilled and untrained. Most business organizations have spent years in building up staffs of efficient, skilled workers, and are dependent upon these staffs to fill their production schedules. The superseniority interpretation would require displacement, in some instances (of which the *Olin Industries* case, in which the number of workers employed during the war expansion period greatly exceeded the peacetime complement, is an excellent example) of all of a skilled staff which has faithfully served through many years of peacetime production and upon which the employer has become entirely dependent. Such a total or near total displacement would, of course, entirely destroy the efficient operations of any enterprises, and even a partial displacement would seriously disrupt production. Further disruptions to production can be anticipated when displacements of older employees become wholesale, or in instances of extreme inequity such as that involving the Wac and the veteran of the First World War. In such cases strikes will be all but unavoidable.

It is not possible to deny that adoption of the superseniority principle is fraught with danger of extremely undesirable consequences, consequences which Congress cannot be said to have intended. Representatives of industry and of management have on many occasions announced their opposition to the superseniority principle. See Factory Management and Maintenance (a McGraw-Hill publication) article entitled "Seniority: A Memo to Government", May 1944 issue; N. Y. Journal of Commerce,

Sept. 20, 1944, p. 1, col. 2; "New Laws Need to Define Rights of War Veterans," id., October 7, 1944, p. 1, col. 6; "Reemployment of Veterans" (Industrial Relations Counselors, Monograph No. 68, 1944) 10; "Survey Shows That Post-war Employment for Returning Soldiers is the Major Problem of Industry", (May 1944) 154 Iron Age 87; "Seniority Bonus", Business Week, Jan. 15, 1944, p. 90; "Reemployment of Veterans: With a Paper on Manpower Outlook" (American Management Association, Personnel Series No. 76, 1944); "Report on Reemployment of Ex-Servicemen and Women", A. A. R. Comm. for Study of Transportation, June 1944); Post, "The Veterans' Problem: A Challenge and an Opportunity" (Nov. 1944) 21 Personnel 126. Many of the current objections to the ambiguities of Section 8 were anticipated in a memorandum of the NAM during the hearings on the Selective Service Bill. Appendix to Hearings before Committee on Military Affairs on H. R. 10132, 76th Cong., 3d Sess. (1940) 632-3. Three months before the promulgation of Memorandum 190-A, the War Labor Board's Shipbuilding Commission refused a union request for a contract provision that veterans whose former jobs were not available should be placed in jobs as nearly comparable as possible, in part on the ground that such a clause would lead to a mass reinstatement of men whose lack of aptitude might seriously impair productive efficiency. *Sullivan Drydock and Repair Co.*, 14 War Lab. Rep. 284 (1944). In a study by a group of economists at Princeton University, entitled "Seniority Problems During Demobilization and Reconversion", Princeton University, Princeton, 1944, the same conclusion was reached:

> "If this notion prevails, many mature and competent employees will lose their positions by legal fiat. It is questionable whether the veteran group, as a whole,

will gain as much in security as the wage earners they displace will lose."

The McGraw-Hill article, above, stated as follows:

"Government can remove a big 'if' from the postwar reemployment problem by setting industry straight on certain points concerning veterans and seniority. It may be assumed that a veteran who returns to his employer with a halfway good claim to a job will be rehired, seniority or no. Still, many companies are relying on seniority to help them preserve basic peacetime working forces * * * and some managements find it hard to believe that any law will ask them to sweep civilians out wholesale to make room for veterans. So here are the questions: Will seniority prove a workable measure of the relative claims to jobs? Or is it a dead issue right now? Also, what is a 'temporary' employee? Industry needs the answers. Government alone can supply them.

* * * * * * *

"Some managements find it difficult to believe that any law will ask them to sweep civilians out of their plants wholesale to make room for veterans. Some companies are relying on seniority to help them preserve their basic peacetime working forces which naturally are composed pretty largely of prewar civilian employees. One example is a company which had 800 employees before the war, has 1700 now, expects to employ 800 after the war, and has 800 service stars in its flag. Obviously something's going to have to give.

" 'If all 800 of our veterans come back, the law will have to tell us what to do,' says the management. 'We should like the law to say that seniority will be the determining factor, but, if it doesn't, we shall need a definite statement of policy from government.' "

In the article appearing in the Journal of Commerce, above, it was stated:

> "Doubts concerning the workability of the policy of Selective Service in granting super-seniority to returning war veterans, under the re-employment provisions of the Selective Training and Service Act, are being expressed by industrialists, it was learned yesterday.
>
> * * * * * * *
>
> "In some industries, however, application of the super-seniority rule will deprive employers of the service of many skilled workers, for want of whom reconversion and re-employment may be retarded, it is pointed out. This is particularly true of industries in which employment has greatly increased during the war, such as aviation, shipbuilding, and machinery manufacturing. In some cases, the number of returning veterans will be far greater than the normal peacetime employment of individual companies."

### 4. Applicable Decisions

The briefs filed by the parties to this cause have adequately discussed the applicable court decisions. The attention of this Court is particularly directed to the very well-reasoned decision of Judge Briggle in *Olin Industries, Inc.*, v. *Joseph Barnett, et al., supra.* That decision, together with that of Justice Learned Hand in the instant case, fully disposes of the various contentions made by the Government herein, and is completely persuasive of the validity of the construction of Section 8 contended for by the American Federation of Labor and the appellees herein.

In addition, the Court is respectfully referred to a very illuminating article on the entire matter in controversy in

this case, appearing in 54 Yale Law Journal at page 417, entitled "Veterans' Reemployment Rights Under Selective Service Interpretations."

Finally, the Court is respectfully referred to the determinations of three different arbitration tribunals, composed of men familiar with the problem of labor and industry, rejecting the superseniority construction of General Hershey. These cases are *In the Matter of Timken Roller Bearing Co.*, 16 L. R. R. 158; *In the Matter of Sullivan Dry Dock & Repair Corporation*, 17 L. R. R. 7; and *In the Matter of Dow Chemical Co.*, 17 L. R. R. 646. The reasoning and logic of these aribtration decisions are extremely convincing and fully support the position taken by the appellees herein and the American Federation of Labor.

## Conclusion

A recent book by Mr. Aaron Levenstein of the staff of the Research Institute of America, entitled "Labor Today and Tomorrow," Alfred A. Knopf, published 1945, succinctly sums up the superseniority issue as follows (p. 226):

> "As written by Congress, the reemployment law was intended to assure the veteran that he would get his own job back; as interpreted by Selective Service, the veteran would be given someone else's job. The veteran would walk into the plant, and the worker who had been there years before would have to walk out. The result would be to put the burden of reemploying veterans on those least able to carry it, the individual workers—not government or industry. As the American Veterans of World War II expressed it, Selective Service would 'rob Peter to pay Paul.' "

It is respectfully submitted that the construction of Section 8 contended for by the appellees herein and the American Federation of Labor is one consistent with the language of the Act, consistent with its legislative history and

consistent with principles of justice and fair play, both as regards returning veterans, non-veteran workers, and employers.

Respectfully submitted,

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(4178)

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IN THE

# Supreme Court of the United States

October Term, 1945

No. 979

[redacted],

*Petitioner,*

vs.

[redacted],

*Respondent,*

[redacted],

*Intervenor-Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

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IN THE

# Supreme Court of the United States

October Term, 1945

No. 970

ABRAHAM FISHGOLD,

*Petitioner,*

*vs.*

SULLIVAN DRYDOCK & REPAIR CORPORATION,

*Respondent,*

ROY GRANATA, ETC.,

*Intervenor-Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

## MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.


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IN THE

# Supreme Court of the United States

October Term, 1945

No. 970

ABRAHAM FISHGOLD,

*Petitioner,*

*vs.*

SULLIVAN DRYDOCK & REPAIR CORPORATION,

*Respondent,*

ROY GRANATA, ETC.,

*Intervenor-Respondent.*

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit**

## MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Now comes Railway Labor Executives' Association, and respectfully moves the Court for leave to file a brief *amicus curiae* in the above entitled action, and in connection therewith, represents to the Court as follows:

1.

Railway Labor Executives' Association is a voluntary unincorporated association, with which are affiliated the

following standard international railway labor organizations:

Brotherhood of Locomotive Firemen & Enginemen
Order of Railway Conductors of America
Switchmen's Union of North America
Order of Railroad Telegraphers
American Train Dispatchers' Association
Railway Employes' Department A. F. of L.
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America
International Brotherhood of Blacksmiths, Drop Forgers and Helpers
Sheet Metal Workers' International Association
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
International Brotherhood of Firemen & Oilers
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen of America
National Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
International Longshoremen's Association
Hotel and Restaurant Employees' International Alliance and Bartenders International League of America

The principal office of said Association is located at 10 Independence Avenue, S. W., Washington 4, D. C.

2.

The standard international railway labor organizations affiliated with Railway Labor Executives' Association represent for the purposes of collective bargaining under the Railway Labor Act more than one million railroad employees, and each of said affiliated organizations is a party to collective bargaining agreements between it and

virtually every railroad in the United States. Such agreements, among other things, contain rules and working conditions which are in part based on the seniority rights of employees as those rights are defined in such collective bargaining agreements.

3.

The issues involved in this case concern the right of a formerly employed veteran to be returned to his former position and to be retained in such employment for one year without regard to the rights to which he would be entitled under existing collective bargaining agreements.

4.

Some of the organizations affiliated with Railway Labor Executives' Association have already been faced with claims of super-seniority by returned veterans and have been threatened with suit in connection with such claims. The rights of said organizations and the employees whom they represent will be determined in this proceeding without opportunity for hearing to them unless Railway Labor Executives' Association is permitted to file a brief and express its views herein as *amicus curiae*.

Dated at Toledo, Ohio, this 18th day of April, 1946.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

October Term, 1945

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ABRAHAM FISHGOLD,

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SULLIVAN DRYDOCK & REPAIR CORPORATION,

*Respondent,*

ROY GRANATA, ETC.,

*Intervenor-Respondent.*

**On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit**

## BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

### STATEMENT OF THE CASE

Since the briefs of the parties to this action will undoubtedly contain detailed discussions of the facts herein involved, we shall refer to them only briefly.

The respondent company and Local No. 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O., were parties to collective bargaining agreements during the entire period of time which is relevant to the issues in this case. These agreements provided in substance that promotions, reclassifications, increases or decreases in the working force should be based upon length of service and ability. The petitioner was employed by the respondent company as a welder and prior to his induction into the armed forces, was an employee whose working

conditions were governed by the above mentioned collective bargaining agreements. He was inducted into the army on May 22, 1943, and after honorable discharge was restored to employment by the respondent company on August 25, 1944. He was steadily employed until April 9, 1945, on which day he was not permitted to work because of the provisions of the collective bargaining agreement relating to his length of service, *i.e.*, his seniority did not entitle him to work. On eight other days from April 9, 1945, to May 24, 1945, the petitioner was denied the right to work for the same reason.

This is an action by the petitioner for the payment for time lost by him as a result of the application to him of the provisions of the existing collective bargaining agreement and for a declaratory judgment to the effect that under the provisions of the Selective Training and Service Act, the respondent company is compelled to continue the petitioner in steady employment for a period of one year as long as the operations of such respondent necessitate the employment of persons holding positions similar or comparable to that occupied by the petitioner.

## QUESTIONS PRESENTED

This case involves the interpretation of Section 8 of the Selective Training and Service Act of 1940.*

*The relevant portions of this section are as follows:

"Sec. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this Act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon written request of the person concerned, shall be given a statement of medical record by the War Department: Provided, That such statement shall not contain any reference to mental or other conditions which

The two important questions in this case, as we see them, are:

(1) Does the position to which a veteran must be restored, carry with it a statutory right to full time employment for a period of one year, regardless of the seniority rights of the veteran or of other employees?

(2) Is a temporary "lay-off," in accordance with the properly applied seniority provisions of a collective bargaining agreement, a "discharge without cause" within the meaning of the Selective Training and Service Act?

It will be the purpose of this brief to support the proposition that the Act does not confer upon the veteran the right to full-time employment for one year without regard to the seniority rights of such veteran or of other employees, and that temporary "layoffs" such as those involved in this case do not constitute discharges within the meaning of the Act. It will be our position that the position to which a veteran is entitled to be restored under the Act is one which will, insofar as it is reasonably possible to

---

in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.

"(b) In case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position and (3) makes application for reemployment within ninety days after he is relieved from such training and service—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so: * * *.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." (50 U. S. C. A. 308.)

do so, place him in the same condition of employment as that which he would have occupied if he had not been inducted into the armed forces, but had remained in his former employment.

We shall further take the position that a temporary release from the actual performance of work in any period during which the employment relationship is continued in effect, is not a discharge.

## ARGUMENT

### General Statement

We should like to preface our discussion of the legal aspects of this case by a statement of the conditions which prevail in the field in which the involved statute must operate, and to direct attention to what would seem to be the fair and equitable purpose sought to be accomplished by the legislation.

It was apparent that with the advent of compulsory military training, certain hardships would flow from compelling employees to leave their jobs to enter military service unless some method was devised to assure them a fair and reasonable opportunity for reemployment at the end of their military service. The persons to be affected were engaged in all walks of life and in every conceivable type and condition of employment. The employment rights of these individuals were extremely varied. Some were employed under individual contracts which provided for employment for a fixed period of time. Some had their employment rights fixed by the terms of collective bargaining agreements. Others were employees at will, and their employment relationship could be terminated at any time with or without cause by the employer.

One question which arose with the proposal of compulsory military training was whether the employment rights of those who were inducted into the armed forces could be preserved. It was clear that in the absence of specific agreement, such employees would lose their employment rights. Upon their return, their opportunity for reemployment would rest solely in the discretion of the employer. In order to protect inducted employees against such eventualities, it was obvious that reliance could not be had upon the device of private contracts which would not be uniform in scope or certain of execution. Whatever relief was to be provided could arise only out of a uniformly applicable statute.

What, then, should be the nature of the protection to be afforded? A determination of this question required consideration not only of the rights to be accorded returning veterans but those of others as well. The employer had certain rights and obligations in the conduct of his business which could not in fairness be disregarded. The fellow employees of the inducted employee had certain rights which in equity and good conscience could not be destroyed. There was only one way in which the rights of all of the parties concerned could be fairly preserved, and that was to place the veteran in the same position in relation to his employer and his fellow employees as that which he would have occupied had he not been inducted, and to protect him in that position for a reasonable period of time after his return to the service of his employer. With the foregoing in mind, we shall proceed to a discussion of the Act.

## I. THE POSITION TO WHICH A VETERAN IS ENTITLED TO BE RESTORED DOES NOT GUARANTEE HIM CONTINUOUS WORK FOR ONE YEAR WITHOUT REGARD TO HIS OR OTHER EMPLOYEES' SENIORITY RIGHTS.

The Act provides in effect that the employer shall restore the veteran to the same position which he occupied prior to entering military service or to a position of like seniority, status and pay, provided the employer's circumstances have not so changed as to make it impossible or unreasonable to do so. Since the petitioner in this case was admittedly restored to his position with the respondent company in accordance with the provisions of Section 8 of the Selective Training and Service Act, it becomes necessary to ascertain the nature of the rights which he acquired by such reinstatement. Specifically it must first be determined whether the position to which he was restored necessarily carried with it a statutory right to continuous work without regard to his or his fellow employees' contractual seniority rights. We shall accordingly discuss first the nature of the rights acquired by the petitioner when he was restored to his former position.

### A. The Act Intended to Prevent the Loss of Rights and Benefits to Which the Veteran's Pre-existing Employment Contract Entitled Him.

The general designation used in the Act to describe the employment status to which the veteran should be restored is "position." He is to be restored to his former position, or one of like seniority, status and pay. It is clear that whatever else may have been intended by Congress, the relationship of employer and employee was to be reestablished if the veteran made application for reemployment under certain specified conditions.

The relationship of master and servant or of employer and employee is a contractual relationship. Thus, an employee's job or position is what his contract of employment makes it. It comes into being only by contract, and, as the product of the contract, carries with it all of the rights and obligations which the contract imposes. The position *may* be one which, under the contract, guarantees continuous work and compensation, but it does not follow that all positions would carry such rights. A position may be such as to continue the employment relationship through inactive periods without interruption and still not guarantee the continuous performance of duties or the receipt of compensation. This is true of employment which is seasonal in nature. The employee does not necessarily lose his position because he does not work. An employee does not lose his position when on vacation, furlough or leave of absence if the contract of employment or the collective bargaining agreement under which he works so provides. On the other hand, if the employment contract creates employment only at the will of the employer, it is possible that the existence of the position is dependent upon the actual performance of the duties of the position and the payment of compensation. There are obviously many conditions which might, by employment contract or collective bargaining agreement, constitute the position of an employee, but whatever they may be, neither the position nor the rights arising out of it are broader than the contract makes it.

It seems clear, therefore, that when Congress made provision for the restoration of the veteran to his former position or to a similar position, it intended to first reestablish the preexisting contractual relationship or one of a similar nature.

This alone was not sufficient to protect the veteran for the reason that some of the most valuable contract

rights of employees are cumulative in nature and depend upon an unbroken employment relationship. It was obvious, therefore, that the mere reestablishment of the preexisting contractual relationship without the protection of these cumulative rights would still leave the veteran in an inequitable position in relation to the other employees and would in effect penalize him because of his military service.

One of the most important of these cumulative rights is that of seniority. This right is one of preferential treatment in ratio of priority of service.* Such priority in itself does not create any right of seniority because seniority rights must originate in some contract.* Seniority as a right entitles the employee to preferences which are varied in nature and such as are specified in the creating agreement. It ordinarily determines the order in which employees will be laid off in a reduction of forces and the order in which they will be recalled when forces are increased. It frequently affords the basis upon which employees are permitted to acquire more desirable jobs and promotions. In order to implement seniority rights, each employee is given a seniority date, which usually corresponds with the date he was hired or the date upon which he assumed a particular job within a specified seniority group. All employees hired thereafter or coming into the seniority group subsequent to the date assigned a particular employee are junior to him and he has preference over them in all matters in which the agreement as to seniority provides for such preference. Seniority is one of the most

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*"If such rights of seniority existed in favor of the plaintiff it must be by virtue of some contract between them and the company either express or implied." (*Boucher vs. Godfrey*, 119 Conn. 622, 178 Atl. 655.) "Although a right of seniority such as is here asserted is undoubtedly a valuable right, it arises only from agreement." (*Donovan vs. Travers*, 285 Mass. 167, 188 N. E. 705.). See also *Shaup vs. Grand International Brotherhood Locomotive Engineers*, 223 Ala. 202, 135 So. 327; *Aulich vs. Craigmyle*, 248 Ky. 676, 59 S. W. (2d) 560; *Ryan vs. New York Central R. Co.*, 267 Mich. 202, 255 N. W. 365.

highly valued rights which employees possess and is a reward for service as well as a protection against unemployment and dismissal after long service. Seniority rights ordinarily accumulate only so long as the employment relationship continues. Once the employment relationship is broken, whether by dismissal or by the voluntary action of the employee, the seniority rights usually terminate or at least are modified. If the employee is rehired even under the identical contract which previously governed his employment rights, he returns as a new employee with a seniority date as of the date of his reemployment or at least with a date less desirable than that which he possessed prior to the termination of his service.

Recognizing this fact, Congress made provision against a lapse of these rights as a result of the interruption of the employment relationship caused by military service by providing that the veteran should be restored "without loss of seniority." In case the veteran is reemployed in a position other than the one which he previously occupied, the Act provides that such position shall be one of "like seniority." To further clarify its purpose, Congress included in the Act a provision that the veteran should be considered as "having been on furlough or leave of absence during his period of training and service." This latter phrase has a considerable bearing upon the cumulative rights afforded the veteran under his prior contract of employment.

"Furlough" is a term usually used to describe a temporary lay-off resulting from a reduction in employee forces. It ordinarily results from the unilateral action of the employer and occurs when the conditions of the employer's business dictate a reduction in the number of employees required. A furlough is not regarded as a dismissal or discharge. The furloughed employee continues in and retains an employment relationship with the em-

ployer as long as he is on furlough and generally speaking is considered to be on furlough as long as it may reasonably be anticipated that he will return to actual service. Most important for our purpose here, however, is the fact that a furloughed employee with seniority rights, retains all of the rights to which his position entitled him prior to his being furfoughed. His seniority accumulates during his furlough and he is returned to work with his seniority rights unimpaired. He does not, however, acquire any greater rights than he would have acquired had he remained on his job.

A "leave of absence" is slightly different from a furlough in some respects, but the rights of an employee returning to work after a leave of absence are identical to those of an employee returning from a furlough, *i.e.*, the employee returns with the same rights he would have had if he had remained on his job and with no greater rights. The principal difference between a leave of absence and a furlough is that a leave of absence is usually granted at the request of an employee due to illness or some other personal reason, and is for a fixed period of time. The employment relationship continues and the employee has the right to return to work at the end of his leave of absence as long as there are junior employees working in his seniority group.

As to seniority, therefore, it seems clear that Congress intended that not only should the veteran's prior contract rights be established but that his cumulative rights should be preserved.

The effort of Congress with respect to these cumulative rights was not confined to seniority. The Act provides that the veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at

the time such person was inducted into such forces." This phrase clearly shows an intention that all cumulative rights to which the veteran was entitled under his prior agreement with his employer would continue to accrue during his service in the armed forces.

Taking all of the above quoted phrases into consideration, it is clear that as to seniority rights, Congress intended that the veteran would receive the same seniority as that which he had when he entered the service and would continue to accumulate any such rights during the entire time he was in military service. In effect, Congress has provided that the employment rights to which the veteran is restored are the same rights as those which the veteran would have had if he had remained in the employ of his former employer and had not entered military service.*

The involved sections of the Act have been so interpreted on a number of occasions. In the matter of the *Arbitration between Dow Chemical Co. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local No. 804*, the arbitrator stated as follows:

> "The language of the statute under consideration is clear and not at all ambiguous. Obviously it is intended to assure those selected for service and training that their old job will be available with its emoluments and their seniority unimpaired just as though they had continued at work." (17 L. R. R. 646-647.)

In another arbitration entitled "*In Re Arbitration Between Timken Roller Bearing Company and United Steel Workers of America, etc.,*" 16 L. R. R. 158, 167, the arbitrator stated:

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*See opinions of attorneys for *American Short Lines Railroad Association* and *Association of American Railroads* that the theory of super-seniority is not supported by the statute (15 L. R. R. 233).

"Nothing in the Act provides that the returning veteran is to get more than he had when he left. Not a word is to be found that even suggests that he is to be favored above his older fellow workers and given a seniority standing superior to theirs irrespective of the length of their employment with the employer. The veteran is not to lose by his term of service but likewise he is not to gain thereby."

In an arbitration between *Firestone Tire & Rubber Company and United Rubber Workers of America, etc.*, 17 L. R. R. 77, 99, the arbitrator stated:

"Neither the statute nor the collective bargaining agreement provides that the veteran shall have super, or superlative seniority rights. They are to be restored to the seniority rights they possessed upon induction plus all increments accruing thereto while they were in the armed forces."

The Solicitor of the Department of Labor had occasion to issue a memorandum dated May 8, 1945, for the information of and advice to the Conciliation Service of that Department (16 L. R. R. 485, 486). Among other things, the memorandum provided:

"Thus, it is our view that the returning veteran is entitled to his place on the seniority list in the business establishment and that the statute does not call for the displacement of senior workers in the event the force has been reduced to such an extent that the issue is raised.

"* * * The Department of Labor interprets the term 'discharge' as applying only to the formal termination of an employee's connection with the company. It does not apply to 'lay-offs.' Accordingly the status of a restored veteran during the first year of his return to employment would depend on his position on the seniority list."

The National War Labor Board, in the handling of disputes arising out of the negotiation of collective bargaining agreements, has had occasion a number of times to deal with the rights of retrning veterans. In approving or disapproving proposed rules relating to the rights of returning veterans the Board has been compelled to give some consideration to the provisions of the Selective Training and Service Act. In numerous decisions, it has interpreted the Act to mean that returning veterans are not entitled to super-seniority. In the case of the *Scovill Manufacturing Company and International Union of Mine and Smelter Workers, etc.*, the company had requested that a rule be added to the collective bargaining agreement providing that in case of lay-off a veteran should not be laid off under the seniority rules but should have prior claim for one year to employment. With respect to this question, the Board said:

> "The company's request should be denied because the panel is of the opinion that the request, as well as Memorandum 190-A, is inconsistent with the intent of the Selective Service Act. The intent of the latter is not to give a positive benefit to the returning serviceman but to protect him against loss of seniority he would otherwise have obtained. It is important for the Board to take into account the reason for the panel's rejection of the company's clause.
>
> "Recommendation
>
> "The company's request on seniority and returning servicemen be denied." (21 W. L. R. 200, 202.)*

*For other cases in which the War Labor Board has passed upon agreements involving rights under the Selective Service Act, see the *Pacific Cotton Mills case*, 21 W. L. R. 507; *Keystone Lime Works, Inc.*, 21 W. L. R. 495; *Goodyear Tire & Rubber Company case*, 23 W. L. R. 89; *Pittsburgh Plate Glass case*, 24 W. L. R. 104; *Erdette Hosiery case*, 24 W. L. R. 209; *General Motors Corporation case*, 24 W. L. R. 155; *American Cystoscope Makers case*, 24 W. L. R. 196; *Murray case*, 25 W. L. R. 217.

As far as we have been able to determine, there has been no case in which the War Labor Board has approved any contract provision, entered any order, or made any comment that recognizes in the returning veteran any right, status or privilege which such veteran would not have had if he had not entered the service but had continued in his employment.

In the case of *Hall vs. Union Light, Heat and Power Company*, 53 F. Supp. 817, 818, the court said:

> "The whole context of the statute and the purpose for which it became the law was to minimize insofar as possible the sacrifices of those who are required to enter the military service by assuring them that their jobs, their pay, and their status with their employers would be held inviolate and secured to them in order that they might *return to the status quo* if they made application within 40 days after they severed their connections with the military forces. The Act uses the language that they shall be *considered as having been on furlough or leave of absence during the period of training and service.* * * * *It is the whole purpose and spirit of the Act in the light of a reasonable construction of the language used to put him in the identical position he was before he entered military service.*" (Emphasis supplied.)

In further support of the foregoing interpretation of the Act, we direct the Court's attention to *Olin Industries, Inc., vs. Joseph Barnett* (D. C. S. D. Ill.) and *George Droste vs. Nash-Kelvinator Corporation* (D. C. E. D. Michigan). These cases will undoubtedly be discussed in the briefs of the parties, and we shall not extend this brief by quoting from them. It is sufficient to say that both courts held that the Act conferred upon the returning veteran no greater seniority rights than those he would have had if he had not left the service of his employer to enter the armed forces.

A consideration of the actual language of the Act discussed above shows a clear intention on the part of Congress to do two things, first, to reestablish the previously existing contract rights between the veteran and his former employer or rights of a similar nature, and second, to preserve any cumulative rights arising out of such contracts which in the absence of statutory protection would be lost to the veteran.

## II. A TEMPORARY RELEASE FROM WORK DURING A CONTINUING EMPLOYMENT RELATIONSHIP IS NOT A DISCHARGE WITHIN THE MEANING OF THE ACT.

We have shown above that the position to which the petitioner was restored gave him no greater employment rights than those which he would have possessed if he had remained in his former employment and not entered military service. We now come to a consideration of that part of the Act which provides that a restored veteran "shall not be discharged from such position without cause within one year after such restoration."

The word "discharge" as used in employment relationships is descriptive only of the situation in which there has been, by the action of an employer, a complete termination of the employment relationship and all of the rights and obligations incident thereto.*

*No set form of words is necessary to constitute a discharge but any words or acts that show a clear intention on the part of a master to dispense with the servant's services and which are equivalent to a declaration to the servant that his services will no longer be accepted are sufficient." (39 C. J. 79, 80.) "The term 'discharge' means to cease to employ." (*Burroughs vs. Riss and Co.*, 179 S. W. (2d) 473 (Mo. App.).) "A discharge is a termination of employment at the will of the employer with prejudice because of some fault on the part of the worker." (*International Association of Machinists vs. State*, 15 So. (2d) 485.) "A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him and all contract relations are at an end." (*Stitt vs. Locomotive Engineers Mutual Protective Association*, 142 N. W. 1110, 1113; 177 Mich. 207.)

A mere denial of a right to work for a temporary period, during which the employee continues to retain a definite contract right to be restored to work under specified conditions, is not a discharge. The temporary release from work during which employment rights are retained is described in well recognized terms in the field of labor relations. If it is caused by a reduction in forces it is usually designated as a "lay-off" or a "furlough." If it is for certain other causes, it may be referred to as a "leave of absence." A vacation is also a temporary release from work without termination of the employment relationship. Congress used the term "furlough" twice in Section 8 of the Act and it must be assumed that it was aware of its meaning in employment relationships. If it had intended that no restored veteran could be temporarily released from service during a period of one year due to a reduction in forces, regardless of seniority, it is inconceivable that it would not have used the word which it had itself recognized as being descriptive of such a situation.

There is no language in the Act which indicates any intention on the part of Congress to use the word "discharge" other than in its commonly accepted meaning. On the contrary, any other interpretation would be inconsistent with the clear purpose of the Act as shown by other words used in it.

It follows that the petitioner was not discharged on the nine days in question, and that the refusal of the respondent company to employ him on such days because of the proper application of his seniority rights constituted no violation of the Act.

## III. THE GRANTING OF GREATER EMPLOYMENT RIGHTS TO REEMPLOYED VETERANS THAN THOSE WHICH THEY WOULD HAVE ACQUIRED IF THEY HAD NOT LEFT THEIR FORMER EMPLOYMENT CANNOT BE MORALLY JUSTIFIED.

Further evidence that Congress intended only to restore the veteran to his pre-induction status is found in a consideration of the equities involved. The effect of "super-seniority" is to give a preference to reemployed veterans over all civilian workers regardless of the prior status of either, and for no other reason than that the former are veterans. If the prior employment status is ignored and the reemployed veterans are preferred over all civilians, such preference must be considered as a reward for military service. So considered, there is no reason why such preference should be conferred only upon formerly employed veterans. It must be remembered that the Act confers no employment rights upon veterans who did not leave an employment status when they entered the armed forces. Such veterans return to civilian life with no employment rights. They revert to their former status. It is not reasonable to conclude that having left one group of veterans with no greater employment rights than those which they possessed when they left for military service, Congress intended to confer upon the other group greater employment rights than they previously held. Such unjust discrimination among the veterans could not be equitably justified. On the other hand, if, as we have pointed out above, both the formerly employed veterans and the veterans who were not employed all revert to their pre-existing employment status, no discrimination will occur among them and a fair and equitable result will be achieved.

These are not the only inequities which will result from the application of the principles advocated by the

petitioner. The above described statutory purposes will be violated in another manner. Nothing should be more clear than the principle that whatever benefits are accorded the veteran because of military service, their cost should be borne by the people as a whole. No individual or class of individuals through purely fortuitous circumstances should be compelled to bear the burden of such benefits. Such will be the result, however, if the theory of super-seniority is applied. The decision of the trial court means that a veteran of World War II who has once been restored to employment will have priority over *all* other employees performing the same or similar work, without regard to the prior contractual status either of the veteran or civilian employee. The oldest non-veteran employee (in point of service) could be replaced by a reinstated veteran who had been employed for only a week before he was inducted. A veteran of World War I could be displaced by a veteran of World War II, for no other reason than that the latter was a veteran of World War II.

The right of every civilian to continue to work would be subordinated to that of a formerly employed veteran, regardless of the status of either. The individual civilian and his family would be compelled to bear the entire burden of the benefit accorded the veteran, even though the employment rights of the civilian were in no way connected with the veteran's military service. No fair and equitable theory can justify such a result, nor does the prevention of a non-veteran from succeeding to the pre-existing employment rights of the veteran require it. No one can deny the propriety of protecting employment rights which a veteran had established prior to his entry into the armed forces and of preventing civilians who stayed at home from depriving the veteran of those rights at the veteran's expense. It is quite another matter, however, to contend that the veteran should acquire rights

which he would not have had if he had remained a civilian and place the cost of such rights upon arbitrarily selected individuals. The resulting discrimination between veterans and civilians, we submit, must by its very inequity, be outside of the statutory purpose and not morally justified.

## IV. THE GRANTING TO REEMPLOYED VETERANS OF GREATER EMPLOYMENT RIGHTS THAN THOSE WHICH THEY WOULD HAVE ACQUIRED IF THEY HAD NOT LEFT THEIR FORMER EMPLOYMENT IS IMPRACTICAL AND DESTRUCTIVE OF LONG ESTABLISHED RIGHTS.

Collective bargaining has, with the encouragement and protection of federal law, become the recognized medium by which rights and obligations of most employees are established and maintained. Agreements between employees' representatives and employers now govern rates of pay, rules and working conditions of the great majority of certain types of employees. As pointed out above, it is these agreements which create seniority as a legally enforceable right. It follows that any statute which refers to seniority as a standard and which purports to create or preserve any rights of veterans in connection therewith must have been enacted in contemplation of the existence of such rights. The theory of super-seniority has the effect of granting the veteran the right to continuous work for one year without regard to the seniority rights of veterans or their fellow employees.

We do not wish to burden this brief with an extended discussion of the practical effect of this interpretation of the statute, but believe that a few examples of the results which may be expected will be enlightening.

It is a matter of common knowledge that many em-

ployers, due to the tremendous volume of production required by the war, greatly extended their operations with a resulting increase in the size of their working forces. Furthermore, because of the induction of millions of men into the armed forces, there was a tremendous increase in employee turnover. As a result of this turnover, the same position of employment was often held by many persons as each in turn was called to military service. With the termination of hostilities, and the resulting cancellation of war contracts, many industrial concerns have been compelled to cut their working forces to peacetime levels and to turn from the production of war materials to their normal peacetime pursuits. As a result of this reduction of working forces, many employers find themselves in the position of having more former employees with veterans' reemployment rights than there are jobs available in their existing working force. In other cases, the formerly employed veteran can be restored to and continued in actual work only if the oldest, most experienced and most trusted employees are displaced. Thus, if seniority rights are not preserved and recognized, both for the veteran and the civilian employee, the employer will find himself with a working force entirely unfamiliar with his normal peacetime business.

This condition would continue as to each veteran for a period of one year, at which time his contractual seniority rights would again become applicable and the veteran would be subject to displacement if he did not have sufficient seniority to permit him continuous work. In the meantime, however, the displaced civilian may, from economic necessity, have been compelled to accept other employment and lose his seniority rights. The employer would therefore be required to dispense with the services of such employees. We cannot believe that it was the intention of Congress to accomplish any such result.

While the most significant fact in the legislative history of this Act is the almost total lack of discussion of reemployment rights, both in the committee hearings and on the floor of Congress, there was one statement made during a debate on the floor of Congress which bears upon the issue here. While the bill which subsequently became the present Act was being considered on the floor, Mr. Barkley made the following statement:

> "There might be numerous instances in which in the period of the year covered by the absence of regular employees the conditions of the company would have so changed that they could not take on additional employees. They might even have fewer regular employees at the end of the year than they had at the time the individual employee entered the service and in cases of that sort it seems to me we could not require a company to restore the employment of men who, if there had been no military service, might have been discharged during the year because of a necessary reduction of the company's forces.
>
> "While I do want to hold out the hope and the moral obligation and the legal obligation insofar as we can that these men are not to lose their *status* when they return by reason of their service to their country, I do not think that it would be fair to undertake to deceive the American people into the belief that every individual who is called into service can be restored to his particular job." (Emphasis supplied.) (Congressional Record, Volume 86, Part 9, page 10,108.)

If the foregoing statement may be taken as an indication of the purpose which Congress sought to accomplish, it is clear that there was no intention to disturb the employment status of workers whose employment rights were unconnected with the induction into the military service of their fellow employees. It recognizes the prac-

tical difficulties of the employer and gives emphasis to the position that the extent of the benefit sought to be conferred upon the veteran was a protection against any loss of his former employment status.

Furthermore, if Congress had intended to set aside long established and valued contract rights of employees which for the most part were acquired under the protection of other federal statutes, it would have done so only in the clearest and most unequivocal language.

## V. AS INTERPRETED BY THE DISTRICT COURT, SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT IS UNCONSTITUTIONAL.

Having shown that the theory of super-seniority is not supported by the language of the statute, by any concept of moral justice, or by a practical consideration of its application to employment problems in industry generally, we should now like to point out that such an interpretation of the statute is unsound for the further reason that, if adopted, it would cast a serious question on the constitutionality of the Act.

It is well established that the courts should not adopt an interpretation of any Act of Congress which will place in doubt the constitutionality of that Act.

> "Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." (*Interstate Commerce Commission vs. Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, p. 40.)
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> "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." (*National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 300 U. S. 1, p. 30.)

See also *United States vs. Shreveport Grain and Elevator Co.*, 287 U. S. 77.

The interpretation advocated by the selective service authorities renders the Selective Service Act subject to serious attack on the ground that, so interpreted, it would constitute the taking of property without due process of law in violation of the Fifth Amendment to the Constitution. Where a collective bargaining contract provides that employees shall receive certain preferences in the matter of employment on the basis of seniority, and a statute is interpreted in such manner as to give to certain of these employees a preferred status, based on their past services in the armed forces, and regardless of their seniority, it is obvious that such a statute operates to take from other employees their vested contract rights.

Rights vested in individuals as a result of contract are subject to the protection of the Fifth Amendment. Speaking of the coverage of this amendment, the Supreme Court, in the case of *Lynch vs. United States*, 292 U. S. 571, 579, said:

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state of the United States."
>
> "The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as *Calder vs. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648, 649, it was said that among other acts which Congress could not pass without exceeding its authority was 'a law that destroys or impairs the lawful private contracts of citizens.' The broad reach of that statement has been restricted (*Legal Tender Cases*, 12 Wall. 457, 539, 550, 20 L. Ed. 287, 311, 312); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed." (*Continental Ill. Natl.*

*Bank & Trust Co. vs. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, page 680.)

"It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired. Generally speaking, that right is protected by the due process clauses of the 5th and 14th Amendments. It is also well established by the decisions of this court that such liberty is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created." (*Highland vs. Russell Car & Snow Plow Co.*, 279 U. S. 253, page 261.)

In light of numerous decisions, it is not subject to doubt that seniority rights are vested contract rights of the individual employee. Although they may be terminated or modified by *bona fide* joint action of the employer and the collective bargaining representative, such rights may not be arbitrarily restricted, and have been recognized as entitled to protection in the courts.

"Rights of seniority, given under a collective-bargaining contract between a railroad company and its employees, are such property rights as will, in a proper case, be protected by injunctive relief in a court of equity." (*Evans vs. Louisville & Nashville R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611.)

"The decisions, so far as we have been able to review them, recognize that 'seniority' is a contract right, and that during the term of its existence (it) cannot be taken away, except in the manner provided in the agreement." (*Gleason vs. Thomas*, 117 W. Va. 550, 186 S. E. 304.)

Seniority rights have been held to be "valuable property" (*Donovan vs. Travers*, 285 Mass. 167, 188 N. E.

705); "property rights" within the protective jurisdiction of a court of equity (*Ledford vs. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 298 Ill. App. 298, 18 N. E. (2d) 568); and as being "contract rights" which are "entitled to protection by the courts" (*Fine vs. Pratt*, Tex. Civ. App. 150, S. W. (2d) 308).

Specifically, seniority rights have in a number of cases been held to constitute "property" within the purview of the Fifth Amendment. In an action to review a decision of the National Railroad Adjustment Board* (*Griffin vs. Chicago Union Station Co.*, 13 F. Supp. 722), the court stated that in its opinion "the seniority rights, which had been accorded to the plaintiff by the Union Station Company and which he held prior to the decision of the National Railroad Adjustment Board, First Division, were property within the meaning of the Fifth Amendment to the Federal Constitution." (Pages 723-724.)

In the case of *Stephenson vs. New Orleans and N. E. R. Co.*, 180 Miss. 147, 177 So. 509, the court said, "The seniority rights of an employee constitute property within the meaning of the Fifth Amendment to the Federal Constitution." In the case of *Nord vs. Griffin*, 86 F. (2d) 481, the court set aside an award of the National Railroad Adjustment Board made without notice to the plaintiff on the ground that his seniority rights were of such nature that to deprive him of them in a proceeding of which he was not notified constituted a violation of due process. In the case of *Estes vs. Union Terminal Co.*, 89 F. (2d) 768, the court appears to have followed much the same reasoning.

It may be fairly concluded, therefore, that the seniority rights of employees are protected by the Fifth Amend-

*The National Railroad Adjustment Board is an administrative board organized under the provisions of the Railway Labor Act for the handling of disputes arising out of grievances concerning rates of pay, rules and working conditions.

ment against any taking without due process. It is clear that the Selective Service Act as interpreted by the Selective Service authorities would have the effect of taking away or abridging the seniority rights of employees not in the armed services. It is, of course, true that every taking of vested rights does not violate the Fifth Amendment. Only when the taking is accomplished without due process of law is it condemned.

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (*Nebbia vs. New York*, 291 U. S. 502, 525.)

No one doubts the power of Congress to make suitable provision for the compensation of those who have served the nation in war. Such compensation, however, must be made on a reasonable basis. It may not be arbitrary. Under the theory of super-seniority, property rights of individuals would be taken away in order that the perquisities thereof could be transferred to other individuals as a reward to the latter for services rendered to the public. As we have pointed out above, if such services are to be rewarded by government enactment, the reward should be at the expense of the whole nation, not at the expense of individual citizens who are arbitrarily selected to bear the whole burden. Without further discussion of this point, it is reasonable to conclude that such a system of rewards at individual expense would be of extremely doubtful validity from a constitutional point of view.

In summary we submit that super-seniority contemplates a taking of vested property rights from certain individuals and transferring them to others without compensation to the former; that such a taking would be wholly

arbitrary and would hence be lacking in due process; that at the very least such an interpretation of this statute would cast grave doubts on its constitutionality.

## CONCLUSION

We have shown that the position to which a formerly employed veteran is entitled to be restored does not guarantee him continuous work for one year without regard to his own or other employees' seniority rights and that Congress intended only to reestablish the former contractual employment relationship of the veteran and to preserve and protect any cumulative rights which the veteran would have acquired had he remained in his former employment and not entered military service.

In support of our position, we have pointed out that the plain language of the statute requires that the Act be so interpreted; that a temporary release from work during a continuing employment relationship does not constitute a discharge; that unless the Act is so interpreted, it will result in discrimination among veterans and between veterans and civilian workers which cannot be morally justified; that any other interpretation will lead to impractical results and destroy long established and valuable contract rights which are encouraged and protected under other

federal law, and that any other construction places the constitutionality of the Act in grave doubt.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,
*Plaintiff-Appellant*

v.

SULLIVAN DRYDOCK & REPAIR CORPORATION,
*Defendant.*

ROY GRANATA, Etc.,
*Intervenor-Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

## BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS AS AMICUS CURIAE


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## BRIEF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AND CERTAIN AFFILIATED ORGANIZATIONS AS AMICUS CURIAE

### STATEMENT

This brief is filed on behalf of Congress of Industrial Organizations (hereinafter referred to as "CIO") and certain affiliated organizations. Pursuant to the provisions of Rule 27(9) of this Court all of the parties to this proceeding have granted written consent to the filing of the brief.

The CIO is a voluntary unincorporated association with principal offices in Washington, D. C. It has affiliated with it labor unions with an aggregate membership of over six million workers employed in virtually every major industry in the United States and Canada. Among the CIO affiliates specifically joining in the presentation of this brief are organizations whose members are employed in such industries as steel, automobile, aircraft, electrical and radio appliances, textile, clothing, rubber, oil, food processing and packing, communications, transportation and others.

Among the members of CIO unions are approximately one and one-half million persons who are or have been members of the Armed Services and who, on returning to civilian life

have or will have rights to re-employment both under the Selective Service and Training Act of 1940 and under collective bargaining agreements between these unions and their employers. The membership of these employees in their respective unions has been maintained for them during their period of service without payment of dues or fees of any kind during their absence or on their return.

CIO unions thus have a very serious responsibility to these veterans and to veterans generally. In this proceeding it is the position of CIO that there is no issue of conflicting veteran and civilian interests. We appear in this proceeding in support of a construction of the re-employment provisions of the Selective Service and Training Act of 1940 which is not merely in keeping with the letter and spirit of the law but is also in the best interests of the veteran, for whose benefit the law was enacted. It is the concern of of the CIO that returning veterans, both in its own ranks and generally, be protected against the serious adverse consequences which will flow from the erroneous interpretation which is sought by the Plaintiff-Appellant.

## QUESTION PRESENTED

There is no issue with respect to the plaintiff's right to be reinstated to the employment rolls of the employer. We do not contest—indeed we urge—his right to be given full seniority credit for his period of service in the armed forces as though he had continued at work in the employ of the company. With this accumulated credit we urge that the plaintiff and all veterans should be given all of the rights as to days of work and other benefits to which their seniority standing entitles them.

The sole issue is whether in addition to and above this restoration of status and credit for accumulated seniority the plaintiff is entitled to be given work even if this means laying off employees with greater seniority.

The position urged by the Plaintiff-Appellant herein has generally been designated as the doctrine of "superseniority". We cannot accept this as an accurate characterization. For reasons which will be apparent on a reading of this brief, the

doctrine urged by the Plaintiff actually involves a rejection of seniority principles and might better be designated as "non-*seniority*". *In view* of the widespread acceptance of the phrase, however, we shall make use of "superseniority" as a convenient label for purposes of brevity in our discussion.

## ARGUMENT

### I.

### THE SUPERSENIORITY DOCTRINE IS CONTRARY TO THE LANGUAGE AND INTENT OF SECTION 8 OF THE SELECTIVE SERVICE AND TRAINING ACT OF 1940.

The Selective Service and Training Act was enacted in 1940. The language of its re-employment provisions contained in Section 8 was so clear and unmistakable in its import that employers, labor organizations and veterans operated under it for a period of almost four years in complete agreement and understanding as to its import. There is so little room in its terminology for any confusion that in this entire period there was never any suggestion or question by anyone that any doctrine such as that which later became known as "superseniority" could be based on its provisions.

In 1944, however, the Director of Selective Service threw a bomb-shell into the veteran re-employment problem by announcing for the first time his concept of the meaning of the statute. His announcement, later embodied in a memorandum which he sent to the Selective Service local boards for their guidance, (Memorandum 190-A) created confusion and consternation in a situation where previously there had been clarity and reason.

As we shall indicate at a later portion of this brief, the interpretation of the Director has been uniformly rejected by employers, employees and by most veterans' groups. The inconsistency and complexity into which his untenable position has forced him has compelled even the Director of Selective Service to modify and revise some aspects of his interpretation. He has, however, persisted in the main core of the doctrine which he created.

The disturbing fact about this background is that the so-called "superseniority" doctrine was created literally out of thin air. The Director of Selective Service has never indicated in any of his publications or elsewhere the precise language of the statute in which he finds any justification for his position.

### A. The Statute

The statute declares that where a serviceman, otherwise meeting the requirements of the statute,

> "has left or leaves a position, other than a temporary position, in the employ of any employer" (Section 8 (b)),

then the employer in question, on receipt of appropriate application,

> "shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." (Section 8(b) (B).)

With respect to the status of an employee so "restored" to "such position," the section goes on to say:

> "Any person who is restored to a position in accordance with the provisions of Paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." (Section 8(c).)

#### 1. The Court Below

The majority of the judges of the Circuit Court of Appeals pointed to the following considerations in reaching their conclusion, in the decision from which the appeal in the present case was taken:

(1) The position to which the veteran is to be restored is

either "such position" or "a position of like seniority, status and pay".

(2) "Such position" is the "position" which the veteran "has left".

(3) If the original position is no longer open the substitute position is one of "like seniority" constituting in effect a position of no greater and no less seniority than the lost position.

(4) To make the veterans' seniority standing on restoration to his original position different from his seniority standing on his original position would mean that the veteran who is restored to a substitute position is not entitled to receive as nearly complete a substitute for the lost original as possible. The veteran on the substitute position is to receive only "like seniority" to the position which the veteran left originally.

(5) Subsection (c) declares that the veteran is to be treated as if he had been "on furlough or leave of absence" and is to be "restored without loss of seniority". This evidences a Congressional purpose to preserve the veteran's existing and accumulated seniority but certainly not to create something other and different from his existing and accumulated seniority.

(6) The guarantee in subsection (c) against discharge without cause guarantees against a permanent end to the employment relationship, a separation, a dismissal. This is not the same as a "layoff".

This line of reasoning is clear. It follows the language of the statute and gives to that language the ordinary meaning dictated by common sense, normal usage, dictionary definition, or any other reasonable standard.

### 2. The "Superseniority" Argument

When we turn, on the other hand, to an examination of the argument of the proponents of superseniority we find extreme difficulty in determining the exact language in the statute in which that argument can find any foundation.

Is it the duty of the employer to "restore" the veteran to an appropriate position which is claimed to be the foundation for the doctrine of the Director of Selective Service?

Or is it the guarantee against "discharge" without cause for a period of one year which is offered as justification?

It would seem at first glance that the advocates of "superseniority" must necessarily base their argument on the duty of the employer to "restore" the veteran, since the doctrine of "superseniority" is urged with respect to the initial application of the veteran for restoration. The prohibition against "discharge" could obviously have no significance in a consideration of that initial application.

This analysis would then pose the issue as one of definition of the term "position". In the eyes of the superseniority proponents restoration to a "position" must mean placing the veteran physically at work in the performance of the duties of a job. In this analysis of the arguments of the proponents of "superseniority" a veteran is not restored to a "position" if he is placed on the employment rolls, given his full seniority rights, including accumulated seniority for his period of service, and given all of the rights and benefits which attach to his seniority standing. Succinctly stated the superseniority advocates must contend that a "position" means solely physical engagement in the work of the job.

There is an internal inconsistency in this line of argument to which neither the District Court nor the Selective Service Administration have ever addressed themselves. The proponents of superseniority have always assumed, as did the District Court, that the status for which they contend lasts for only one year. Under the statute, however, the one year limitation applies only to the guarantee against discharge without cause. If the right to "superseniority" arises out of the right to be restored to a "position," then it is a right without any specific time limit. The statute does not say that the "position" to which the veteran is to be restored is one which shall last for only one year. On the contrary, a "position" lasts as long as the veteran remains in the employ of the employer.

On the other hand, if the doctrine of superseniority rests on that portion of Section 8(c) which guarantees against discharge without cause for a period of one year, then there would be no basis for applying the doctrine to the initial application of the veteran for restoration. The guarantee against "discharge" by the express language of the statute comes into play only "*after* such restoration".

The District Court in the present case, making no analysis whatsover of the actual language of the statute, apparently sought to evade any resolution of this dilemma by referring to each of the days of layoff in the present case at one point as a "refusal to employ the plaintiff" (Finding of Fact No. IX) and elsewhere as a "discharge" (Conclusion of Law No. IV). The court gave no indication as to how the same act on the part of the employer could constitute both "refusal to employ" and also a "discharge".

Thus, neither of these portions of the statute can either of themselves or in combination, even as construed by the proponents of the "superseniority" doctrine, offer any complete justification for that doctrine. Disregarding that difficulty, however, the fact is that the language and history of the statute furnishes no support for the interpretation which is thus sought to be placed on the term "position" or on the term "discharge".

**B. Restoration of the Veteran to His "Position" Does Not Require Continuous Physical Employment on the Job.**

The statute declares that where a serviceman "has left or leaves a position" the employer is required to "restore" him to "such position." The *position* to which he is to be restored is thus the *position* which he "has left or leaves."

It may be noted at the outset therefore that if being restored to a "position" requires that one be put physically to work, and if failure to put a veteran physically at work on a job although justified by his seniority standing nevertheless constitutes a failure to restore the veteran to a "position", then the "position" which the veteran "has left or leaves" must also be one which involved his having been physically at work on the job.

Does this mean then that a veteran who at the time of his induction was in a state of layoff due to a temporary curtailment of operations has no rights under Section 8? Clearly, he was not physically at work on the job at the time of his induction. If this means that he did not have a "position," then he did not "leave" a position and is without any restoration rights.

We have no doubt that the supporters of superseniority will

shy away from this conclusion—and properly so. But if a veteran who was in a state of temporary layoff at the time of his induction can be deemed to have left a "position," how can it be said that restoration of that veteran "to such position" requires that he be given work regardless of his seniority status?

### 1. Meaning of "Position" in Employment Relationship

The simple fact is that the concept of a "position" involves an employer-employee relationship to which is attached a group of rights and obligations defined by the collective bargaining agreement or other documents which set forth the rules of employment in the employer's establishment. It is a relationship which continues through periods of temporary layoff, illness, etc., and whose termination is itself dependent on that same body of employment rules and regulations. A man is restored to his position when he is restored to that relationship and endowed with all the rights and benefits to which he is entitled in that relationship. The right to engage in the physical performance of the duties of the job is among the attributes of the relationship and the extent of that right is defined by the same body of rules and regulations.

This simple and clear formulation of the rights involved in the obligation of the employer to restore the veteran to his position is supported by common-sense understanding, by well-established industrial practice, by law, and by the full text of the statute involved in this case.

#### a. Dictionary definition.

As to the use of the term in common parlance, Webster's New International Dictionary, Unabridged, Second Edition, defines the word "position" as follows:

> "The manner in which anything is placed, arranged or disposed either with reference to the relative position of its parts, or with reference to other things.
>
> "Relative place, situation or standing . . . hence, office; employment; situation; place; as to reconsider one's position . . ."

**b. Indications in other subdivisions of Section 8.**

Reference to other portions of Section 8 can leave no doubt as to the meaning of the term.

***The Language of Section 8(b)(B)***

Section 8(b)(B) makes specific reference to a position "of like seniority, status and pay."

In referring to a "position" which is "of like seniority" the framers of the statute clearly indicate that a position as they use the term is something to which is attached the attribute of a group of "seniority" rights. It is quite obvious that the mere physical performance of a certain set of duties does not in and of itself carry with it any "seniority." All men doing the work of welding are performing the same duties, but they obviously do not hold the same "position" insofar as their seniority is concerned. Each man has a seniority which is dependent on his length of service and on the nature of the unit which is established by practice in the establishment as the proper unit for the computation of seniority.

When the drafters of the statute speak of a position of "like . . . status," they make equally clear that the "position" has attached to it something other than merely the concept of the performance of certain duties. Clearly, the "status" of each individual welder is not identical with that of all other welders. Their relative standing and job rights depend on many other factors.

How are "seniority" and "status" to be determined?

Seniority is not defined in the statute. The term has no fixed meaning in law or in fact. Quite the contrary, the variations in seniority systems are infinite. The systems and definitions vary in the American industrial picture from industry to industry, from plant to plant, and frequently from department to department within a single plant. [See "Union Agreement Provisions," Bulletin 686, U. S. Department of Labor 1942; "Collective Bargaining Contracts," Bureau of National Affairs (1941)]

In any seniority system a determination must be made as to the unit within which the relative standing which determines seniority is to be computed. Determinations must be made as to what constitutes a break in the continuous service

on which seniority is computed. A determination has to be made as to the extent of the rights which "seniority", once determined, actually confers. In some instances it becomes the sole determinant of promotions, demotions and layoffs. On the other hand, it may be simply a factor to be considered along with relative ability of the competing individuals to perform the job to which they seek promotion.

The answers to all these questions are found in the collective bargaining agreement or in other documents which reflect the established practices and rules in operation with respect to a specific "position."

When one speaks of a "position" of "like seniority" or of "like status," one recognizes that the rights and benefits which attach to a "position" are defined by the established or agreed upon employment rules and practices governing the "position."

The same is true with respect to all of the other incidents and attributes of a man's position in an establishment, including such matters, for example, as vacation rights, place of work, shift assignment, manner of payment, etc.

***The Language of Section 8(c)***

Section 8(c) further emphasizes the correctness of our construction of the term "position". This section declares that when restored to a position the veteran is to be (1) considered "as having been on furlough or leave of absence"; (2) deemed to be restored "without loss of seniority"; (3) "entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence", and (4) is not to be discharged without cause within one year.

The fourth of these items we leave for more extended discussion in the section of this brief immediately following. The first three, however, give very clear evidence of the nature of the "position" to which the statute makes reference.

The status of one who has been "on furlough or leave of absence" can certainly not result in a "position which is *different* from, or has attributes of seniority or other elements which are added to, the "position" from which the employee has been furloughed or has taken leave.

By the same token if it were the intent of the legislature to bring about the reinstatement of the veteran to a situation in which he is entitled to work every day and all day regardless of his seniority status, then there would be no significance in a special provision to assure his restoration "without loss of "seniority." On the contrary, however, the legislature specifically recognized and accepted the existence of standard systems of seniority in American industry and directed that in accordance with those systems the veterans' rights under those systems be *preserved*. The protection given the veteran was a protection *within* the framework of the seniority system. Congress did not seek to sweep aside the seniority system.

As the United States District Court for the Southern District of Illinois has said on this precise issue:

> "The principle of seniority among workmen in industrial plants has long been the cornerstone of harmonious relations between the employer and employee and today has become generally accepted by both capital and labor. We should not lightly attribute to Congress the intention of overthrowing and disturbing this relationship in the absence of language clearly evidencing such intent. The Act itself recognizes the principle." *Olin Industries, Inc.* v. *Barnett*, Civil No. 618, U. S. Dist. Ct. S. D., Illinois, January 24, 1946, Briggle, J. (reported in Vol. 17, Labor Relations Reporter, p. 756).

**c. The Selective Service Director has found it impossible to adhere consistently to his untenable position.**

The foregoing discussion has indicated that the terms of the statute clearly recognize that a "position" does not involve a limited concept merely of physical engagement in the work of a job, as the superseniority doctrine implies, but carries with it all the attributes of the employment relationship as determined by the employment rules and practices in effect at the plant.

The Director of Selective Service has himself found it impossible to carry out the logical implications of his own limited concept.

Thus the original document in which the superseniority doctrine made its debut in 1944 has undergone substantial

revision in content even while this case has been wending its way through the courts. In Memorandum 190-A as originally issued the Director of Selective Service recognized that once he had declared, under "superseniority," that there is an absolute priority right in the physical tasks of a specific job, then each of several successive job holders could not be given the same absolute priority. As a result he was forced to the conclusion that where a man who entered the Armed Forces was replaced by another and the latter was in turn drafted, the second man had *no re-employment rights at all.* This conclusion was reached by declaring that one who takes the job formerly occupied by a veteran is necessarily a "temporary" employee.

In September, 1945, Memorandum 190-A was superseded by a new Handbook* issued by the Director of Selective Service. This time the Director decided that the person who takes a job formerly occupied by a veteran is not necessarily a "temporary" employee (Handbook, Section 303.3).

Having recognized that possibility, the Selective Service Director was faced with the question as to which of two returning veterans would be entitled to priority in the event that at the time of their return or after restoration there should be insufficient work for both. In this situation the Selective Service Director decided to recognize the principle of seniority [Handbook, Section 306.3(c)].

How this is to be reconciled with the duty of the employer to restore each veteran to his "position" does not appear. If restoration to his position means putting the veteran physically to work, and if seniority of non-veterans is no excuse, there is no indication as to why seniority of other veterans is to be deemed adequate justification for failure to comply.

Thus apparently at the whim of the Director of Selective Service the present doctrine accords a partial recognition to seniority as determined by the established employment practices, but arbitrarily sets its own limits and refuses to accept the full implications of a full seniority system.

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* "Handbook: Veteran's Assistance Program of the Selective Service System", hereinafter referred to as "Handbook".

It is interesting in this connection to recall that there is presently in effect a statute providing re-employment rights for persons who left employment in order to enter the Merchant Marine (Act of June 23, 1943).

The wording is absolutely identical in its relevant portions with that of Section 8 of the Selective Service and Training Act of 1940.

Under these circumstances presumably the Selective Service Director would be forced to merge the seniority of the Merchant Marine veterans and the land and naval force veterans. The result would then be two seniority systems side by side; one in effect by virtue of the established employment practices at the plant; and the other covering relationships among veterans and Merchant Marine personnel only, established by fiat of the Director of Selective Service.

Moreover, it is equally unclear whether the Director of Selective Service will undertake to lay down all of the details of the seniority system which he has established among the veterans. For example, will he determine the units within which seniority is to be computed and applied? Will he promulgate the rules as to when and under what circumstance the continuous service of an employee is deemed to be broken so that he loses his seniority status? Will the Director of Selective Service determine whether seniority alone governs promotions or whether other factors are to be considered?

If these functions will not be undertaken by the Director of Selective Service then we would assume that it will be the established seniority rules and practice at the employer's establishment which will make these determinations. If that is the case then it is hard to see on what basis the Director of Selective Service can rationalize his willingness to accept the employment rules as determinants of the rights involved in a "position" insofar as the competing rights of veterans are involved, while at the same time refusing to accept those established practices as the determinants of the rights attached to a "position" for all purposes.

These are merely some of the complications introduced, wittingly or unwittingly, by the departure of the Director of Selective Service from the clear terms of the statute. Cutting

through all of this is the simple and common sense conclusion stated succinctly by the United States District Court for the Southern District of Michigan in the following language:

> "The term 'restore such person to such position' as used in the Act, means reinstatement of such person to the same relative place, rank or standing in the employment of his employer as he would have had if he had not been required to leave his employment for World War II training and service in compliance with the Act." *Droste* v. *Nash-Kelvinator Corporation,* Civil No. 5010, U. S. Dist. Ct. S.D. Michigan, January 30, 1946, Lederle, J. (reported in Vol. 17 Labor Relations Reporter, p. 761). See also *Olin Industries, Inc.* v. *Barnett, supra.*

The conclusion is well stated in summary form by one able arbitrator who was faced with the issue created by the unwarranted interpretation publicized by the Selective Service Director:

> "The language of the statute under consideration is clear and not at all ambiguous. Obviously it is intended to assure those selected for service and training that their old job will be available with its emoluments and their seniority unimpaired just as though they had continued at work. It provides that a person who 'has left or leaves a position' in the employ of a private employer, and who returns under the conditions stated, shall be restored 'to such position or to a position of like seniority, status and pay'. The word restore means to put back into the original place or state. The phrase 'or to a position of like seniority' indicates clearly that seniority is considered one of the attributes of a position with a private employer.
>
> "Likewise in Section 8(c) it states that a person so restored 'shall be considered as being on furlough or leave of absence' during his service, and 'shall be so restored without loss of seniority'. The language thus far clearly indicates an intention to assure the trainee that he will not lose his accumulated seniority rights. There is not one word which is susceptible of being interpreted as intending to give him something more than he would have had if he had remained at work." (Dow Chemical Company and United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, November 29, 1945, Dudley E. Whiting, Arbitrator.)

2. Legislative History

This clear and common sense view is fully supported by what clues are available in the Congressional discussion leading up to enactment of the statute.

The following colloquy on the floor of the Senate is particularly instructive (86 Cong. Rec., 10107, 76th Cong., 3rd Sess., August 9, 1940):

> "SENATOR DANAHER: Is it meant . . . that if a man goes out to serve his country . . . and comes back, he assumes his prior status, less one year's payment?"
>
> "SENATOR BANKHEAD: That is what this bill intends, as I understand. This is what the members of the committee thought should be and could be done!"

Senator Barkley, one of the leading proponents of the Act, stated during the debate (page 10108):

> ". . . it seems to me we could not require a company to restore the employment of men who, if there had been no military leave, might have been discharged during the year because of a necessary reduction of the company's force."

Senator Sheppard in presenting the bill on the Senate floor stated (page 10093) with reference to Section 8 that:

> "It attempts to prevent loss of seniority, accrued employment benefits, including participating in insurance, pension, bonus, and other benefit programs."

This has in general been the spirit of court decisions upholding the constitutionality of the Act and applying its terms. See *Hall* v. *Union Light, Etc., Company*, 53 F. Sup. 817, at 818 and *Grasso* v. *Crowhurst*, 58 F. Sup. 857, decided February 15, 1945.

In the court below some effort was made to draw sustenance for the superseniority interpretation from the fact that the provisions of the Selective Service Act were extended by Congress after the views of the Director of Selective Service had been made public. It is suggested that this constitutes implied Congressional acceptance of the Director's interpretation. A few brief comments may be made with respect to this suggestion:

(1) As we shall indicate in a subsequent portion of this brief, the Director operates under no statutory power to issue any binding or authoritative interpretations of the law. He does not administer or enforce the re-employment sections of the law. At the time when his views were made public they were contrary to the generally accepted interpretation of the law and his views were sharply and immediately disputed by employers and employees alike. Under these circumstances it is hard to see what obligation can be found on the part of Congress to take any cognizance of his views at the time of the extension of the law.

(2) Other agencies of Government have issued interpretations in conflict with that of the Director of Selective Service.

(3) Since the ruling of the court below in the present case the House of Representatives has passed a bill calling for further extension of the Act. The argument might with equal validity be made—but we shall refrain from doing so—that at least one House of our National Legislature has thus accepted an interpretation of the law at variance with the Director of Selective Service.

In net, it seems fair to say that at best when Congress extended the law its interpretation was in a state of dispute. Congress apparently preferred to leave the solution of that dispute to the courts.

**C. The Superseniority Doctrine Cannot Be Supported by the Statutory Prohibition Against "Discharge Without Cause."**

We turn now to a determination as to whether the superseniority doctrine can find any support in the portion of the statute which declares that after restoration to his job the veteran may not be "discharged from such position without cause" for a period of one year (Section 8(c)).

The "discharge" provision of the statute is very expressly part of a sentence which commences: "Any person who is restored to a position . . ." The discharge provisions of the statute can come into play only after the veteran has been "restored." Any doubt on this score is further dispelled not merely by any understanding of the meaning of the "discharge" but further by the express language:

"and shall not be discharged from such position without cause within one year *after such restoration.*"

We are thus faced at the outset with the unavoidable fact that the "discharge" language cannot support "superseniority" in its entirety. Let us assume, however, that by some sleight of hand this initial hurdle is eliminated. Is there anything in a guarantee against "discharge without cause" which can be said to declare that a veteran once restored to his position is immune from temporary layoff in accordance with proper seniority rules when the volume of work is reduced?

That conclusion can be reached only by declaring, as did the District Court, that any layoff even for a single day is a discharge.

It is a short and sufficient answer to this to declare that it simply does violence to the accepted meaning of the terms "discharge" and "layoff".

The Circuit Court of Appeals in the present case quite appropriately quoted from the Oxford Dictionary definition of "discharge" (Vol. II, page 412, subtitle "discharge" 1, 3) as follows:

"To relieve of a charge or office; (more usually) to dismiss from office, service or employment; to cashier."

This the dictionary distinguishes from "layoff" (Supplement page 8):

"A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off season."

The court in the case of *Droste* v. *Nash-Kelvinator*, *supra*, said:

". . . plaintiff contends that the provision 'shall not be discharged for one year after such restoration' should be interpreted to read 'shall not be transferred or laid off from such job classification regardless of his seniority, unless the rights of another veteran of the World War II are involved.' In order to construe the Act in this manner, it is necessary to add language to the Act which is not there, or to disregard entirely the usual and well settled definition of the word 'discharge'.

> "10. 'A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him and all contract relations are at an end.' *Stitt* v. *Locomotive Engineers Assoc.*, 177 Mich. 207."

The arbitrator to whose decision reference has previously been made stated the conclusion succinctly:

> "Is 'discharge' synonymous with 'layoff'? Discharge is universally recognized as meaning to terminate employment, whereas layoff means to suspend or cause to cease work for a time. The courts have recognized that difference in these words as does the dictionary. See 24 Words and Phrases 447; Teller on Labor Disputes and Collective Bargaining, Vol. 2, Sec. 276, p. 753; North Whittier Heights Citrus Ass'n v. NLRB, 109 Fed. (2nd) 76; Waterman Steamship Co. v. NLRB, 309 U. S. 206." Dow Chemical Company arbitration, cited above.

It is interesting, moreover, to consider some of the implications of the notion that a day's layoff is a discharge. Presumably the proponents of superseniority would then declare that where there is a complete company shutdown for a single day the resulting "discharge" for that day is not prohibited because it is not "without cause." Having been "discharged" with proper cause, is the veteran then to be told that he has no right to return to the job the following day because his employment has been ended?

The Director of Selective Service has attempted in his recent Handbook to avoid this consequence by suggesting that the veteran's right to reinstatement after a layoff is the same right that he had initially in making application for restoration and that right lasts for one year. (Part 3, Chapter 6, paragraph 5(b).)

The simple fact is that this is not so.

The statute provides for a single application for reinstatement which must be made within ninety days of the date of discharge. Moreover, if this right of reinstatement persists for a year, would the Director of Selective Service suggest that where a veteran is discharged for misconduct, drunkenness, theft, etc., he nevertheless has the right to reapply and the

right to be restored to his "position" simply by making application the following day so long as the one year period has not passed?

Thus by attempting to make a layoff equivalent to a discharge, the superseniority doctrine puts the veteran in the situation where his position is ended and his rights are lost any time the plant closes down for however short a period. That is clearly not what was intended and is a distorted consequence that can arise only from the warped interpretation which the Director of Selective Service has placed upon the statute.

The court in the *Droste* case, *supra*, pointed out another anomalous consequence of the position taken by the Director of Selective Service:

> "If 'layoff' is construed to mean the same thing as 'discharge' the World War II veteran who was inducted into the Service while he was temporarily laid off could not be restored to a position, but would have to be rehired. The Act makes no provision for rehiring. It is only by using the usual and accepted interpretation of the term 'restore such person to such position' that the rights of all returned veterans can be protected."

Once we return to the very clear and simple language of the statute and its obvious meaning in the light of well understood and long established concepts of employment relationships, all of these complexities and difficulties disappear. We may turn once more for a simple and direct explanation to the arbitration decision previously cited:

> "After the restoration or hiring, there exists a status of employment which is terminated by discharge or quitting. Many factors may determine whether one actually works on any given day while his status of employment continues, such as, he may be sick, the plant may be closed, he may be on vacation, he may be temporarily laid off, he may have been injured, etc., but none of them terminate his employment nor have any bearing upon the fact that he has been restored to his position in compliance with the Act." *Dow Chemical Company* arbitration, *supra*.

## II.

## THE INTERPRETATION ON WHICH SUPERSENIORITY MUST REST ADVERSELY AFFECTS THE RE-EMPLOYMENT RIGHTS OF VETERANS AND DEPRIVES THEM OF RIGHTS AND BENEFITS TO WHICH THEY ARE LEGITIMATELY ENTITLED UNDER THE SELECTIVE SERVICE AND TRAINING ACT OF 1940.

Under the court's construction, many veterans will be deprived of any substantial values that the statute might otherwise confer upon them.

Some reference has been made in the analysis under Point I to consequences which logically flow from the superseniority doctrine. For convenience, a few of these consequences may be outlined under three headings.

1. Some veterans, properly entitled to protection under the statute, would be declared not to have held any "position" at the time of their induction.

2. Some veterans who concededly left a "position" to enter the service, on their return would be deprived of benefits to which they are properly entitled.

3. Even after restoration to their positions veterans would logically be subject to a constant threat of termination of their "position" contrary to the intent of the statute and contrary to the protections now afforded by union agreements.

### *1. Veterans without "positions" at time of induction.*

Reference has been made previously to this anomalous consequence of the superseniority doctrine. If the word "position" to which the veteran is to be restored requires as an element that he be physically engaged in the duties of the job, then any veteran who at the time of his induction was not physically engaged in the duties of his job could not be said to have left a "position" as required by the statute. This would operate to deny the benefits of the Act to veterans who were at the time of their induction in a state of temporary layoff or on leave of absence or away from their jobs because of illness.

The same consequence indeed would flow from the lower court's conception of the nature of a "discharge." If a single

day's layoff constitutes a discharge, then a veteran who at the time of his induction was away from his job because of a temporary layoff can be said to have been "discharged" prior to his induction.

*2. Veterans denied benefits on their return.*

By the same analysis, if a veteran returns to find his plant in a state of temporary shutdown due to retooling, material shortage, strike, or any other factor, the superseniority proponents would say that his "position" does not exist. Nor, by the same token, does any "position of like seniority, status or pay" exist. On application filed by the veteran the employer would be quite within his rights in stating that within the meaning of the language of the statute it is "impossible or unreasonable" to restore the veteran.

Counsel for the plaintiff in his brief in the District Court (page 23) quite callously stated this conclusion:

> "In all of this discussion, it is, of course, conceded that, where, due to a change of condition, no similar work is being done for the employer at the time of the veteran's return, there is no obligation to create a job."

Such a concession is required by the superseniority doctrine for which plaintiff's counsel was contending, but it is a concession which is a betrayal of the best interests of veterans generally and an attempted destruction of rights to which the statute properly entitles them.

Obviously, under any sensible understanding of the facts of the situation and of the meaning of the word "position" the veteran's "position" does exist. He is entitled to be restored to the employer's employment rolls even if no work is immediately available, and is entitled to be recalled to work in accordance with his seniority. Such a "position," however, the proponents of superseniority do not recognize.

There is another type of situation in which the superseniority doctrine would deny to the veteran on his return benefits to which he is entitled. In very many plants labor organizations during the war have succeeded in advancing the welfare of the employees and increasing the benefits and rights which attach to the "position" which the veteran left. That

"position" may have had added to it vacation rights, special promotion rights, extra bonus rights, and many others.

In the limited concept of the superseniority doctrine a man who left a job of welding is entitled to restoration to the job of welding. The superseniority doctrine rejects the notion that the "position" has attached to it all of the rights and limitations and obligations defined by the employment rules.

An alert employer, therefore, might quite validly contend that in restoring the man to the job of welding he has restored the man to the "position" as defined by the superseniority doctrine. The "position" as defined by common sense and common understanding should, however, include all of the attributes both new and old which attach to the "position" as of the time of the veteran's return.

***3. The veteran is under constant threat of termination of his "position."***

Reference has been made to this consequence in Point I. By ordinary understanding a "discharge" constitutes a termination of employment. If every layoff is a discharge, then once a veteran has been laid off under circumstances which even the superseniority doctrine would recognize as valid—such as a temporary plant shutdown—then the veteran has been "discharged" and his employment is at an end.

All other employees, protected by the ordinary applicable employment rules as usually embodied in the union agreement have a continuing employment status which entitles them automatically to be recalled in order of seniority. The veteran, however, is left only the slim reed of the completely unsupported judgment of the Director of Selective Service that he may reapply for his job as in the case of his initial return from service. The Director of Selective Service does not suggest in his handbook what the veteran is to reply to an employer who may point out that applications for "restoration" to a position must be made within ninety days of the date of discharge from the armed services.

***4. In its broader implications superseniority is contrary to the veterans best interests.***

The preceding paragraphs indicate that even in the narrowest view, superseniority is a threat of the veteran's welfare.

In considering the warped and unsupported construction involved in the superseniority doctrine, however, the court has equally a right to view the doctrine in its broader impact on veterans as a group and as a part of the working population of the country. The doctrine seeks to throw out of joint, complicate and impede in each plant an established seniority system which has usually been developed over years of negotiation between labor and management and which represents a practical and equitable judgment as to the proper means of job allocation with the greatest protection for the rights of individual workers.

Approximately 80 percent of the veterans who have returned or will return from the armed services are men who had no employment before entering the service of a nature such as to entitle them to any application of Section 8. Of the remaining 20 percent, by far the largest proportion have had and may be expected to have no difficulty with their restoration to their old jobs. This superseniority doctrine, therefore, can conceivably offer its deceptive "benefits" only to a very slight percentage of the total number of veterans.

That minute and at best illusory benefit is to be purchased at the expense of a weakening blow at the established seniority system which will be the long-range reliance not merely of the veteran but of all of the employees in the plant for the job security which all are seeking. It is purchased at the expense of a distortion of the distinction between discharges and layoffs which if carried into other fields endangers well-established rights and benefits, vacation rights, pension rights, re-employment rights after layoffs, and innumerable others for which the labor movement has fought and which the labor movement has secured for veterans and non-veterans alike.

The labor movement generally has addressed itself consistently to the specific problems of veterans. The veteran is afforded an overwhelmingly larger amount of protection under union agreements than under any interpretation of the Selective Service and Training Act. Protections against discharge and assurances of seniority rights are his without regard to any such technical questions as the nature of his army dis-

charge or whether some job held in years past was or was not "temporary." He is not left to the lengthy and inadequate remedy of court action to enforce his rights. The union agreement throws the power of the organization, the grievance committee and relatively rapid arbitration procedure behind the veteran. The unions have sought and obtained special contract provisions for disabled veterans (*Matter of Columbia Machinery Engineering Corporation;* 19 WLR 68), or special provisions to guarantee vacation eligibility for veterans (*Matter of N. A. Woodworth Company,* 20 WLR 329), as well as the addition of contractual guarantees to the statutory protection already set forth in the law (*Matter of Building Managers Association of Chicago,* 7 WLR 448; *Matter of Building Managers Association of Chicago,* 11 WLR 88; *Matter of Retail Grocers Association,* 15 WLR 22).

On the other hand, the approach taken by the proponents of superseniority seeks in the purported interests of a small percentage of all veterans to create a conflict of interest or a cleavage between veterans on the one side and on the other side their fellow workers in the plants and in the labor organizations which are seeking to advance the interests of both. More significantly, it seeks to set off veterans of this war not merely as against their fellow workers generally but also as against large numbers of World War I veterans who, with many years of seniority may find themselves set aside by a person with six months of service now claiming the job.

It is small wonder then that when confronted with direct question as to whether they preferred the normally applicable seniority doctrines or the illusory "benefits" of superseniority, 85 percent of veterans questioned by one employer expressed a preference for the former (17 Labor Relations Reporter, 775).

## III.

## THE INTERPRETATION ON WHICH SUPERSENIORITY MUST REST CONTRARY TO PUBLIC POLICY AND WILL HAVE SERIOUSLY HARMFUL EFFECTS ON THE NATIONAL WELFARE.

On this point we may turn at the outset to some expert testimony in the form of a decision rendered on this very issue

by an arbitrator familiar by virtue of long experience in industrial relations with the problems of labor and management. His conclusion was that:

> "To give to the veterans seniority standing ahead of all others would entail a serious economic and social upheaval. The older workers carrying family responsibilities which come with maturing years would find themselves displaced, despite their long service in industry, by younger men who, as a rule, have only themselves to care for. Established industrial organizations would be disrupted and thrown into confusion. Trained and proven workers would have to be dropped, their places to be taken by men of relatively small experience with skills as yet not fully developed. The task of reconversion to a peacetime economy, difficult at best, would be hampered to a degree that might well prove dangerous. Unemployment, if it comes, will be all the more devastating since it would fall most heavily on those of our working people who bear the greatest financial burden and who, by very reason of their years and length of employment at a given task, would find readjustment most difficult." (United Steelworkers of America and Timken Roller Bearing Company, decided March 13, 1945, Herman A. Gray, Arbitrator.)

The same thought is expressed by the court in the case of *Olin Industries* v. *Barnett*, *supra*. Reaching a conclusion opposed to superseniority the court declared:

> "A different construction would most certainly create such an unrest and upheaval in industrial relations as would retard economic recovery and be of no lasting benefit to anyone, including the veteran."

The full implications of the superseniority doctrine should be evaluated against the background of an understanding of the industrial picture in many establishments in this reconversion period. There are innumerable plants in this country which have mushroomed during the war period to employment rolls several times that which prevailed in the prewar period. In this expansion they have hired large numbers of men who have served for six months, one year or two years and then been inducted into the armed services. Now in the postwar period, returning to their former peacetime operations, the

plants return to their earlier level of employment. They would be precluded by the concept of superseniority from retaining their original employees. They are required to fill their requirements from among the thousands hired during the war. They are faced with a requirement of virtually 100 percent turnover and a requirement of operation with a group of employees almost all of whom will have been out of touch with the job for three or four years.

This is not a hypothetical situation. It is one which is being repeated in plant after plant throughout the country. It is precisely the picture posed, for example, in the facts of one recent court decision directly on the issue now before this court. *Olin Industries, Inc.*, v. *Barnett, supra.* The employer in that case had an average of 2,333 employees in the years 1935 to 1939. In 1943 the employment rolls had gone to 11,926. In September, 1945, after the end of hostilities the number had fallen back to 4,369. During the War, however, 3,459 employees had entered military service, a total approximately 50 percent greater than the total prewar employment, and, all under superseniority, entitled to priority over prewar employees.

In one category of employment in the same plant, a prewar employment figure of 30 casters rose to 100 during the war and fell to 24 after the war. All of the 24 were persons long in the company's employ but without military service. In the case involved, a veteran with less than 9 months' employment as a caster was seeking to displace an employee with 12 years of employment with the company, 5 as a caster.

The court itself outlined the facts of one of the specific situations involved in the case, as follows:

> "Defendant Slaten now has more than 32 years' service with the plaintiff. After 28 years he was promoted to be an adjustor supervisor. Bonds was employed by the company in 1942, at the near peak of their war expansion, and became an adjuster supervisor in ten months, and later entered military service. His contention now is that upon his return he is entitled under the Act to oust Slaten from his job. Such a construction of the Act can in no sense be squared with ordinary justice and fair play and I cannot believe that Congress so intended."

Older workers carrying family responsibilities which come with mature years are thus threatened with displacement despite long service in industry. The displaced older workers include veterans of World War I, wives or parents of World War II veterans, and indeed, even veterans of World War II who have exhausted their one year of special protection. Established industrial organizations are threatened with disruption and confusion by the dropping of entire staffs, including trained workers, in favor of a completely new and young body of employees, many with skills not yet developed to the point necessary for carrying on the work effectively. Veteran is being pitted against non-veteran in a scramble for jobs. Basic protections essential in the long run to veteran and non-veteran alike are being seriously undermined.

It is no wonder, therefore, that there has been such unanimity of opinion on the part of employers and employees alike, as well as on the part of many veterans' groups, in opposition to the position of the Director of Selective Service. The reaction of some employers almost immediately on the heels of the publication of the views of the Director are outlined in Fortune Magazine for October 1944, at page 258, et seq.

The Association of American Railroads, in an opinion adopted by its Law Committee on September 21, 1944, declared (15 LRR 233):

> "The requirement . . . that the returning veteran must be restored to work 'even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority' is not supported by any direct language of the statute . . .
>
> "It is obvious that compliance with paragraph 1(c) would have the effect of giving added seniority status to the soldier in lieu of 'like seniority'. The Selective Service Memorandum itself is inconsistent with and shows error of paragraph 1(c) by the provision in paragraph 1(f) that
>
> > 'the seniority of a person in service accumulated during such service to the same extent and in the same manner as if such person had remained in continuous employment.'
>
> ". . . Congress intended that he should not be preju-

diced with respect to his employment by being called for military training or service; it did not intend to effect an enlargement by reason of such calling."

A similar view has been expressed by the American Short Line Railroad Association in a memorandum dated October 6, 1944 (15 LRR 233).

The Journal of Commerce on September 20, 1944, in a story headed "Super-Seniority For War Veterans Held Unworkable; Concern as to Soundness of Selective Service Rule Voiced by Industry" went on to say:

> "In some industries, however, application of the super-seniority rule will deprive employers of the service of many skilled workers, for want of whom reconversion and re-employment may be retarded, it is pointed out. This is particularly true of industries in which employment has greatly increased during the war, such as aviation, shipbuilding, and machinery manufacturing. In some cases, the number of returning veterans will be far greater than the normal peacetime employment of individual companies. . . .
>
> "When layoffs are made necessary by reconversion, further complications are feared by industrialists. Selective Service has ruled that servicemen are to be exempt from layoffs during their first year of re-employment in their original job under the provisions of the Act, which state that the veteran may not be discharged 'without cause' during this period. While it is expected that large-scale shutdowns for reconversion may be recognized by Selective Service as a legal basis for laying off re-employed veterans, industrialists fear that the policy thus far pursued by Selective Service will result in the displacement of veterans of World War I and of other deserving and vitally needed workers.
>
> "Industrialists hope that Selective Service will not interpret the re-employment law in such a way as to encourage a cleavage between veterans and civilian workers. The resultant strife would prove a great handicap to employers in effecting a smooth reconversion, it is pointed out."

To similar effect, see Industrial Relations Memorandum No. 88 of Industrial Relations Counselors, Inc., entitled "Re-employment of Veterans", dated April 17, 1944; also "Senior-

ity: A Memo to Government" in the May 1944 issue of "Factory Management and Maintenance" (McGraw-Hill).

The National Legislative Representative and Rehabilitation Director of the Veterans of Foreign Wars has said:

> "On its face the rule may seem to give a lot of security to servicemen. Actually it is a gold brick. For one thing, it may lead to the dismissal of veterans of the first World War to make room for those of this war.
>
> "What's most serious, is that the ruling would wreck existing union seniority systems—and in the end veterans would thus be left with practically no protection at all.
>
> "The best and fairest method is that provided for in union contracts—under which returning soldiers regain their former seniority, plus accumulated seniority for the time they were in uniform. That means a square deal all around." (Interview published in "Labor," official organ of the Railway Brotherhoods, August 26, 1944.)

The American Veterans of World War II, speaking for a membership of 100,000 has stated that its policy is to demand jobs for all and not just World War II veterans with statutory reinstatement rights, and that to require the discharge of a civilian to make room for a veteran would be "robbing Peter to pay Paul" (15 LRR 198).

The American Veterans Committee has taken a similar position (Bulletin, American Veterans Committee, July 15, 1945).

Commentaries in legal journals have agreed in the conclusion that the superseniority doctrine is not merely invalid but extremely undesirable. See, for example, *Veterans Reemployment Rights under Selective Service Interpretations*, 54 Yale Law Journal 417, March 1945; *Veterans Seniority*, 5 Lawyers Guild Review 266.

## IV.

## THE OVERWHELMING WEIGHT OF AUTHORITY IS OPPOSED TO THE INTERPRETATION ON WHICH SUPERSENIORITY MUST REST.

Prior to the publication of the superseniority interpretation sponsored by the Director of Selective Service there had been

virtually no issue or problem of any sort in the minds of labor, management or returning veterans as to the meaning of the re-employment provisions of the Selective Service and Training Act of 1940. There was no litigation and no occasion for decision by arbitrator or court.

The intrusion of the Director of Selective Service into a field with which he was obviously not very familiar has provoked a flurry of controversy and litigation. There have been decisions by four courts directly on the issue in the present case, two of these being the decisions of the two courts through which the instant case has passed on its way to this Court. There have been decisions by a large number of arbitrators, under collective bargaining agreements, to whom employers and labor organizations, their labor-management relations thrown into turmoil, have been forced to resort. Conflicting views have been offered by various federal agencies, with the Director of Selective Service until very recently standing entirely alone in his unsupported judgment.

At the present time, it is fair to state that the overwhelming body of authority—judicial, arbitration and administrative—is opposed to the view originated and espoused by the Director of Selective Service.

**1. Court Decisions**

Two Federal Courts, other than those directly involved in the present case, have ruled directly on the issue presented in the present case. Both courts have rejected the doctrine of superseniority. *Olin Industries, Inc.* v. *Barnett*, Civil No. 618, U. S. Dist. Ct. S.D., S.D. Illinois, January 24, 1946, Briggle, J. (reported in Vol. 17, Labor Relations Reporter 756); *Droste* v. *Nash-Kelvinator Corporation*, Civil No. 5010, U. S. Dist. Ct. E.D., S.D. Mich., January 30, 1946, Lederle, J. (reported in Vol. 17, Labor Relations Reporter, 761).

One court has expressed its views collaterally on the issue. The case before it, however, in no wise involved a superseniority problem, since the veteran involved had been without dispute reinstated and was at work. The sole issue before the court was the extent to which his seniority rights could be regarded as frozen by the statute so that they could not be

affected by a collective bargaining agreement made after his return—indeed more than a year after his return. *Trailmobile Co.* v. *Whirls*, C.C.A. 6, 17 Labor Relations Reporter 1196.

**2. Arbitration Decisions**

Some reference has been made previously to individual arbitrators' decisions. It is important to recognize that these are not merely isolated instances. The issue has been coming up with increasing frequency throughout the country and has been before these men chosen for their experience in labor problems and for their impartiality as between labor and management. Without exception and in the face of the gratuitous advice of the Director of Selective Service, these arbitrators have expressed their views.

Following is a list of reported arbitrators' decisions on this issue, all in unanimous accord in rejecting the doctrine of superseniority.

Dow Chemical Co. and UAW-CIO, Nov. 29, 1945, Dudley E. Whiting, Arbitrator.

Timken Roller Bearing Co. and USA-CIO, March 13, 1945, Herman A. Gray, Arbitrator.

North American Aviation, Inc., Jan. 31, 1945, Clyde Emery, Arbitrator.

Firestone Tire and Rubber Co., Aug. 27, 1945, Board of Arbitrators.

New York Shipbuilding Corporation, July 27, 1945, Robert P. Brecht, Chairman of Adjustment Board.

**3. Administrative Decisions**

The same position has been taken uniformly by various divisions of the National War Labor Board during the period of its operation. In *Matter of Scovill Manufacturing Co.*, 21 WLR 206, the First Regional Board denied a proposal by the employer that returning veterans should be granted absolute job priority in accordance with the Memorandum and confirmed the report and recommendations of its panel which stated:

"The Company's request should be denied because the panel is of the opinion that the request, as well as Memo-

randum 190-A is inconsistent with the intent of the Selective Service Act. The intent of the latter is not to give positive benefit to the returning serviceman but to protect him against loss of seniority he would otherwise have obtained."

In *Matter of Jamestown Metal Equipment Co., Inc.*, 17 WLR (July 14, 1944) at 252, the Second Regional Board denied the Company's request that employees in the armed forces be granted double seniority for time spent in such service, adopting instead the panels' unanimous proposal that:

> "The period of absence of any employee of the Company in the armed services of the United States shall be equivalent to employment in the Company for the purpose of determining seniority."

The Bureau of Labor Statistics, before the Selective Service Administration took any position on the issue, stated:

> "The Selective Service Act as well as union agreements seeks to give maximum assurance that a returning veteran who left a permanent job has equal chances with those who remained and a prior claim *over those who were taken on during his absence in military service.*" (Military Service and War Job Clauses in Union Agreements (Aug. 1942).)

Thereafter the Solicitor of the Department of Labor, in a statement issued to the United States Conciliation Service for the guidance of federal conciliators in dealing with problems relating to the re-employment rights of veterans, declared (16 LRR 485):

> "The Department of Labor interprets certain provisions of the Selective Service and Training Act differently from the Selective Service Administration. These interpretations of the Department of Labor are no more binding than the interpretations of the Selective Service Administration. They are maintained, however, not only by the Department, but also by business institutions, and labor organizations. Accordingly the commissioner of conciliation should be informed of these interpretations as well as the interpretations of the Selective Service Administrator.
>
> "I shall state the major questions which are outstand-

ing at the present time and the interpretations which have been made.

**Superseniority**

"Question: Is a returning veteran entitled to re-employment even if the number of jobs in the employing establishment has been reduced to such an extent that he would have been laid off or discharged had he remained continuously in employment rather than entering the military service?"

"Answer: It is the view of this Department that the statute should be construed to entitle a veteran to restoration of his job rights in accordance with the seniority system or other system or relative status existing in the plant (or, if none exists, to preference according to dates of first employment by the employer, due consideration being given to continuity of employment), with accumulation of seniority for the time spent in the armed services. The statute should be construed as providing that the veteran's relative seniority rights (or their equivalent, if no plant seniority system exists) determine, not only his right to re-employment (with whatever upgrading or other benefits employees with equivalent seniority or status who did not enter the armed forces became entitled to during his period of service), but also his rights during the succeeding year to upgrading and promotion and against demotion or layoff (as distinguished from discharge). Thus it is our view that the returning veteran is entitled to his place on the seniority list in the business establishment and that the statute does not call for the displacement of senior workers in the event the force has been reduced to such an extent that the issue is raised.

**Layoffs**

"Question 2: Assuming a veteran has been restored to his job and a subsequent reduction in employment would require that he be laid off under the seniority rules of the establishment, does Section 8 prevent such layoff for one year from the date of his restoration to employment?

"Answer: The Department of Labor interprets the term 'discharge' as applying only to the final termination of an employee's connection with the company. It does not apply to 'layoffs'. Accordingly, the status of a restored veteran during the first year of his return to employment would depend on his position on the seniority list.

"The Director of Selective Service takes the view, however, that 'a veteran who has been restored to his former position cannot within one year be displaced by another on the ground that the latter has greater seniority rights.'"

The position of the Department of Justice on the issue of superseniority has a somewhat spotted background. For a substantial period of time, and down to the point at which the present case was pending in the Circuit Court of Appeals, the Attorney General had simply instructed his District Attorneys to the effect that the superseniority interpretation "is not free from doubt under the Act". The District Attorneys were therefore advised, in bringing actions on behalf of veterans in accordance with their duty under the Act, to take no position on the issue but to present the considerations pro and con "with full candor".

When the present case was argued in the Circuit Court of Appeals in January 1946, more than a year and a half after the superseniority doctrine was first enunciated by the Director of Selective Service, the Department of Justice was apparently persuaded to resolve its doubts and to file a brief *amicus curiae*. Among the signers of the brief was an attorney formerly associated with the Director of Selective Service.

We cannot agree that there is even any "doubt" as to the invalidity of the position of the Director of Selective Service. The significant fact, however, is that in an examination of the weight of administrative authority we find that the Selective Service Administration was for a long time the only agency of Government sponsoring the superseniority doctrine. Today there is added only the somewhat delayed and hesitant affirmation of the Department of Justice.

**4. The Selective Service Director's Interpretation Is Entitled to No Weight**

The "superseniority" interpretation created by the Selective Service Administration was issued four years after the Act was passed. It was not adopted as the result of any hearing or investigation in which interested and affected parties were given an opportunity to express their views. It was not adopted pursuant to or following any court decision establishing any such interpretation. It followed four years of

uniform assumption that Section 8 provided for accumulated and not superseniority (a full discussion of this aspect of the issue is found in 54 Yale Law Review, page 417, Note 38).

Finally the interpretation was issued by an agency which has no function other than to establish a personnel division "with adequate facilities to render aid in the replacement in the former positions of persons who have completed their service." The agency has no power to hold hearings, find facts, issue orders, take any steps to compel compliance, enforce the statute, or interpret it. The Selective Service Director has no function which empowers him to place an interpretation on the statute which is entitled to any special weight, beyond its own merits, in the courts.

## CONCLUSION

In conclusion, we should like to refer very briefly to an issue which apparently will be raised for the first time in this Court. We have been advised informally that it is the intention of the Department of Justice to urge that no decision be rendered on the merits in this case on the grounds that the failure of the employer to participate in the appeal from the District Court to the Circuit Court presents a fatal jurisdictional defect.

We cannot conceive that such an issue can be urged by the Department of Justice. The union was admitted without objection as an intervening party in the District Court. The appeal by the union to the Circuit Court of Appeals was challenged on no grounds other than the merits of the issue of statutory interpretation involved in the case. The issue which is now reportedly to be made by the Solicitor General was in no way involved in the application for certiorari to this court.

The union is a direct party to a contract embodying rights of substantial significance, financial and otherwise, to the members whom the union represents. The decision of the District Court directly and adversely affects that contract and those rights. There would seem, therefore, to be very little merit to any such issue as is now reported to be contemplated.

The problem of superseniority has created untold difficulty for labor, management and veterans. Those difficulties will increase and become more complicated as any final decision

on the issue is delayed. It was presumably in recognition of this fact that the Department of Justice sought and secured exceptional speed in the scheduling of this case for argument. There would be a strange anomaly in any attempt on the part of the Department at this stage of the proceeding to seek to avoid a direct ruling on the basic issue.

On the merits the statute states a clear, simple and unambiguous principle. It requires restoration of the veteran to all of the rights, status and benefits attaching to his position, including any which have been added in his absence and including an accumulation of seniority during his period in the armed forces.

It is vital for the effectuation of the principles of Section 8 of the Selective Service and Training Act of 1940 and for the best interests of American veterans, their fellow workers and industry generally that this Court reject the superseniority doctrine and follow the simple requirements of the language of Section 8.

Respectfully submitted,

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 970

ABRAHAM FISHGOLD,
*Petitioner,*

*v.*

SULLIVAN DRYDOCK & REPAIR CORPORATION, ROY GRANATA, etc.,
*Respondents.*

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

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OCTOBER TERM, 1945

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*Respondents.*

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ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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## BRIEF OF THE AMERICAN LEGION AMICUS CURIAE

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### PRELIMINARY STATEMENT

This brief is filed on behalf of The American Legion as Amicus Curiae, pursuant to the written consent of the parties to this action as required by Section 9 of Rule 27 of this court.

The American Legion is a non-political, civilian organization originally chartered by Act of Congress September 16, 1919 (U. S. C. A. Tit. 36, Sec. 41-51, incl.), which was amended October 29, 1942 (U. S. C. A. Tit. 36, Secs. 43 and 45). The Federal Act outlines its purposes[1] and, among other things, fixes eligibility for membership,[2] which is composed of veterans of World War I and World War II who have served in the naval or military services of the United States between certain dates, or who, being citizens of the United States at the time of enlistment, served in the naval or military services of any of the governments associated with the United States during either of said wars, provided, however, that such person shall have an honorable discharge or separation from such service or continue to serve honorably after the date of cessation of hostilities as fixed by the United States Government.

The Legion is composed of fifty-eight (58) departments, forty-nine (49) of which are located within the continental limits of the United States. These departments, in turn, are

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1. *Purposes of Corporation*—The purpose of this corporation shall be: To uphold and defend the Constitution of the United States of America; to promote peace and good will among the peoples of the United States and all the nations of the earth; to preserve the memories and incidents of the two World Wars fought to uphold democracy; to cement the ties and comradeship born of service; and to consecrate the efforts of its members to mutual helpfulness and service to their country. (As amended Oct. 29, 1942, c. 633, Sec. 1, 56 Stat. 1012, U. S. C. A. Title 36, Sec. 43.)

2. *Persons Eligible to Membership*—No person shall be a member of this corporation unless he served in the naval or military services of the United States at some time during the period between April 6, 1917, and November 11, 1918, or during the period between December 7, 1941, and the date of cessation of hostilities as fixed by the United States Government, all dates inclusive, or who, being citizens of the United States at the time of enlistment, served in the military or naval services of any of the governments associated with the United States during either of said World Wars; *Provided, however,* That such person shall have an honorabe discharge or separation from such service or continue to serve honorably after the date of cessation of such hostilities as determined herein. (As amended Oct. 29, 1942, c. 633, Sec. 2, 56 Stat. 1042, U. S. C. A. Title 36, Sec. 45.)

organized into post or chapter organizations, and at the present time there are over fourteen thousand (14,000) such posts throughout the United States with a total membership of 2,800,000 engaged in the rehabilitation of the returning veteran and committed to service to the community, state, and nation.

Our organization is not dominated by either capital or labor, but it is amply represented in every community by a cross-section of both groups. Its membership is not restricted as to race, color, or creed, but is determined only by whether the applicant for membership has had honorable service in either or both of the two World Wars fought for democracy.

Since the inception of the late war, The American Legion has sponsored much legislation designed for the care of widows and orphans of those veterans who lost their lives in the service of their country, and for the purpose of rehabilitating the returning veteran so that he may take his proper place in the community upon his return to civilian life and become a useful citizen. Included in this legislation was the Service Men's Readjustment Act (Pub. Law 346, 78th Cong., 58 Stat. 293), commonly known as the G. I. Bill of Rights. This legislation makes it possible for the returning veteran to complete his education and to obtain loans for home and farm purchases and business ventures. It further provides unemployment benefits. Under Title IV, Section 600(a), a Veterans' Placement Service Board was created consisting of The Administrator of Veterans' Affairs, the Director of the National Selective Service System, and the Administrator of the Federal Security Agency or the agency performing such functions, and under Section 601(e), the Board is authorized, among other things, "to

assist in every possible way in improving working conditions and the advancement of employment of veterans." Consequently, The American Legion is deeply interested in the enforcement of Section 8 of the Selective Training and Service Act of 1940, as Amended, which provides re-employment rights to the veteran upon the completion of his period of service, the construction of which is presented for review in the instant case. We believe that it was the intent of Congress that a liberal construction be given to this legislation in order that immediate rehabilitation be afforded in the field of employment, so that the veteran might receive the benefit of compensation for labor performed, and so that he might re-acquire the skill which was lost by reason of his period of service in the armed forces.

## LEGION'S POSITION

In view of the fact that the rehabilitation of the veteran is of prime concern to the community, state, and nation, The American Legion is interested in the accomplishment of this objective at the earliest possible moment. The veteran has done a magnificent job in the performance of the obligations which were cast upon him under the terms of the Selective Training and Service Act and by his efforts has preserved the security of the nation. In return for such service we believe that he is entitled to a liberal construction of Section 8 of said act guaranteeing to him certain re-employment benefits which we contend were extended as an aid to his rehabilitation upon return to civilian life. A narrow construction of this legislation would defeat the intent of the statute. We know of no problem that is greater or more important to the continued well-being of

the community, state, and nation than the re-employment of the veteran who is not in a position to continue his educational activities or engage in business ventures, even though it may mean the displacement of a non-veteran for the limited period of one year, as this right, if accorded, will be of distinct value in his rehabilitation in the community in which he resides. It will not be our purpose in this brief to attempt to place the veteran upon a pedestal, but we do not want to see him penalized and placed at a permanent disadvantage by reason of his service to his country in time of need. We contend that the rights accorded under Section 8 of the Selective Training and Service Act, under discussion, contemplated continuous employment for a period of one year upon the veteran's return, unless the employer's status has so changed as to make this impossible or unreasonable. The act surely did not contemplate that the veteran should be denied work if it was available because other non-veterans had a greater seniority status. If such an interpretation were indulged, the right would be illusory, and the purpose of the legislation would be defeated. Rehabilitation and the re-aquisition of skill cannot be accomplished if the veteran is placed on the payroll but not given work to do.

The Opinions Below, the Jurisdiction of this Court, the Statement of the Case and its Disposition will have undoubtedly been set forth in the briefs of the parties to this Cause, and we shall avoid repeating them herein. We shall also leave the recital of the evidence and other portions of the record to the parties in this cause and shall devote this brief to the discussion of the foregoing problems. Suffice it to say, however, that the Plaintiff in the Trial Court, Abraham Fishgold, as shown by the record below, returned from

the military service and was restored to his former employment. He was subsequently denied employment for a definite period, preference being given to a non-veteran under a collective bargaining agreement which the Union and the employer had entered into after the adoption of the Act and in his absence. He sued for the wages to which he would have been entitled had he worked during this period, and the lower court gave him judgment, which was reversed in a majority opinion March 4, 1946, by U. S. Second Circuit Court of Appeals, Justice Chase dissenting. The case presents the rights of the veteran under sections 8 (b), and 8 (c) of the Selective Training and Service Act, as Amended, and we shall proceed to the discussion of such rights. We have, however, set out in Appendix A the pertinent portions of the Selective Training and Service Act, as Amended, the construction of which are involved in this Appeal.

## SUMMARY OF ARGUMENT

POINT I. Under Sections 8 (b) and (c) of the Act, the Veteran is entitled to be restored to his former position and afforded actual employment for one year thereafter without regard to the seniority if the work he previously performed is still available.

1. Legislative intent supports this view.

2. The Act should be liberally construed to carry out the Congressional intent.

POINT II. The rights accorded in Sections 8 (b) and (c) of the Act are independent rights and cannot be impaired by collective bargaining agreements.

1. Seniority rights of non-veterans under collective bargaining agreements, pursuant to the Wagner Act, are suspended as they conflict with the rights accorded the veteran under Sections 8 (b) and (c) of the Selective Training and Service Act.

POINT III. Refusal, by reason of seniority rules contained in a collective bargaining agreement, to give the veteran work for one year after his return violates Section 8 (c) of the Act.

1. "Super-seniority" is a misnomer as applied to veteran's rights.

POINT IV. Rules of the Selective Service Administrator construing the veteran's right should be followed.

1. The majority opinion in the court below is inconsistent with the uniform application of the Act.

POINT V. Relative Equities involved.

## ARGUMENT

### I.

### Under Sections 8 (b) and (c) of the Act, the Veteran Is Entitled to Be Restored to His Former Position and Afforded Actual Employment for One Year Thereafter Without Regard to Seniority If the Work He Previously Performed Is Still Available.

Section 8 (a) of the Act provides:

> "Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *"

The requirements enumerated in Section 8 (a) and those enumerated in Section 8 (b) of the Act were met by the plaintiff in the instant case, thus entitling him to restoration to his employment under Section 8 (b) of said Act, which reads as follows:

> "In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such

certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety* days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *"

The veteran is to be restored without loss of seniority and shall not be discharged from such position without cause within one year after restoration, as provided in Sec. (c), in the following language:

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the em-

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* At time plaintiff applied for re-employment, this read forty days.

> ployer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *"

When these sections are read together, it will be noted that they confer independent benefits on the returning veteran which he would not have otherwise enjoyed upon the termination of his service. Subsection (b) of Section 8 extends the right to re-employment to a veteran who "has left or leaves a position, other than a temporary position, in the employ or any employer."

In the original drafts of the Act, the term "job" was used instead of the word "position" which appeared in the final draft of this legislation. We submit that the latter term was more inclusive than the former and would cover not only employment involving manual labor, but professional services which also require skill, ability, and training. This viewpoint finds support in the case of *Kay v. General Cable Corporation,* Misc. No. 778 A. U. S. District Court, New Jersey, Jan. 8, 1946, in which a physician was asserting his right under this section to reinstatement as medical director of the defendant corporation, in which the court held:

> "Where the wage increase of a particular position results neither from an overall company wage policy, nor from automatic in-grade increases, the veteran is not automatically entitled to an increased wage for the sole reason that another who presently holds the same or a like position as that formerly held by the veteran is presently receiving a higher wage. In such case it can in no way be said that the veteran has been denied any seniority rights.

"This is the more true where the position in question is of a professional or special nature requiring individual skill, ability and training such as is the position here involved. In such a case the wage is determined by individual ability rather than on a wage scale on the job itself."

Section 8 (c) of the Act provides that the veteran shall be restored without loss of seniority and shall not be discharged from such position without cause within one year after such restoration. It is inconceivable that the legislative intent was to restore the veteran to his position, prevent his discharge without cause for one year, and yet not intend that he perform actual work if such was available. Such an interpretation would nullify the meaning of these two guarantees and would defeat the purpose of rehabilitation of the veteran who has performed his part of the obligation required by the entire Act.

The term "seniority" as used in Section 8, Paragraph (B) of said Act merely prescribes a method of determining the alternative job to which the veteran was to be restored if his old position was not available and had no reference to his seniority status. It did not relate to "some relative 'position' in a figurative line of men available for work." (Judge Chase, dissenting opinion in Circuit Court of Appeals.) It means the restoration to a job comparable to the one he left and not inclusion on a seniority roster.

**1. Legislative Intent Supports This View.**

In September, 1940, the major portion of Europe was at war, feeling was tense, and preparations were being made for the security of our country in the event it was drawn into the conflict. Congress was faced with this situa-

tion at the time of the enactment of the Selective Training and Service Act of 1940, which included Section 8.

A review of the legislative history of this section discloses that its primary purpose was to provide the veteran, upon his return from military service, actual employment for a period of one year on the job which he was forced to leave, regardless of his seniority rights, if the work he formerly performed was still being done.

The original bill, later to be known as the Selective Training and Service Act, provided no re-employment rights upon termination of military service, but this provision was first incorporated in committee. The original draft of the bill by the Senate Military Affairs Committee included the statement that "the purpose and intent of Congress that every man who is called from a job * * * ought to be re-employed in such job or an equally good one without loss of seniority. * * *" (Committee Print No. I, July 23, 1940.) In the fourth draft in committee a provision was included directing re-employment to be "without loss of seniority or benefits or insurance participation or benefits." Also the rights on restoration were incorporated in a paragraph separate from that providing re-employment, and provision against discharge without cause for a period of one year was included. The committee report clearly expressed the intent and purpose of Congress to be "that every man who leaves his job to participate in this training and service should be re-employed, without loss of seniority or other benefits, upon his return to civilian life." (Senate Report 2002, 76th Congress, 3rd Session, P. 8.)

Reference was made to Section 8 by Senator Thomas, member of the Senate Military Affairs Committee, as "the

attempt of the committee to make secure persons' jobs after the year's service." (86 Cong. Rec. 10572.) Representative Celler, in referring to the Companion House Bill, stated, "All those who serve shall have the right to claim return to their jobs." (86 Cong. Rec. 11435.) Many like expressions by those considering the bill indicated that actual employment was contemplated. (See 86 Cong. Rec. 10107-10487-11697.) After the bill had reached the Senate Committee, the House Military Affairs Committee in affording additional protection inserted the word "seniority" before the phrase "status and pay" as applied to a like position in the event the veteran could not be restored to the one he left.

Representative May in commenting on this insertion stated:

> "You will find in that amendment Nos. 12, 13, and 14, the House inserted the word 'seniority' relating to a position held by the guardsmen. It is inserted in three places and provides that he shall be restored to his seniority status. In other words, if a man who is a Civil Service employee in the Government of the United States and is called into service, he shall be restored on his return to the senior position he held before he left, without losing that seniority position. Likewise, with a railroad employee, under a system of seniority rights on the railroad that gives the older men in the service priority over the others, that man when he returns shall be restored to his seniority position." (86 Cong. Rec. 10761.)

An amendment was also added to subsection (c) protecting seniority rights so that it read as follows:

> "Any person who is restored to a position in accordance with the provisions of Paragraphs (A)

or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces*, shall be so restored without loss of seniority, *shall be entitled to participate* in insurance or other benefits offered by *the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces*, and shall not be discharged from such position without cause within one year after such restoration." (Italicized portions indicate added language.)

Representative May, on behalf of the House Committee on military affairs, explained the amendment as follows:

> "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service, and they will even be permitted to count this time on the question of their retirement." (86 Cong. Rec. 11702.)

Senator Sheppard, speaking in favor of the amendment in the Senate, stated:

> "That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life. It seems to me a good suggestion." (86 Cong. Rec. 10914.)

During the consideration of the "work or fight" (H. R. 1752) legislation considered by Congress in 1945, the in-

clusion of re-employment provisions was considered. Under Section 6 (a) of this proposed legislation, as adopted by the Senate March 8, 1945, the civilian employee was extended re-employment rights similar but not identical with those afforded the veteran, in that the period for application for reinstatement was reduced to thirty (30) days and a proviso was added at the conclusion of the subsection as follows:

> "*Provided*, That this section shall not be construed to confer greater employment rights than the individual would have had if he had remained employed in such position during the period of the employment or employments accepted by him upon the request of the Chairman of the War Manpower Commission."

Senator Thomas, Chairman of the Senate Military Affairs Committee, made the following comment in explanation of this subsection to the Senate:

> "In order to implement and supplement the recruitment efforts of our public employment offices, the bill includes, in section 4 (c), provisions for furnishing transportation, in cases where that is necessary to relieve manpower shortages which substantially impede the war effort, and includes, in section 6 (a), provisions for protecting the re-employment rights of workers who leave their jobs to become employed in work essential to the war effort in response to requests, or requirements made under the bill. The re-employment rights so provided are substantially those provided for veterans in section 8 of the Selective Training and Service Act, with two exceptions: First, the period within which application for re-employment in the former position must be filed is 30 days in lieu of the 90-day period

> provided for veterans; and, second, civilians accorded re-employment rights under this bill are not to secure greater employment rights than they would have had if they had remained in their original positions for the period during which they are employed in jobs accepted by them under the bill. The War Manpower Commission will issue certificates to persons entitled to re-employment rights under this section for the purpose of establishing the facts upon which the right to re-employment is dependent." (91 Cong. Rec. 1451.)

Senator Burton, now Mr. Justice Burton, also a member of the Senate Military Affairs Committee, made the following statement in explaining the effect of the foregoing proviso (91 Cong. Rec. 1583):

> "The tenth point relates to re-employment. This provision is roughly similar in its intent, but not entirely identical with the provision for men who are drafted into the military service, and who will come back and seek their original employment after having been taken from it. * * * There is a proviso which puts him back in precisely the same position in which he was when he left. He does not get an added guaranty of a year's employment upon his return."

These comments clearly indicate that Congress intended that the veteran have a guaranty of employment for one year after his return from service. We believe they completely answer the contention of those who assert that the word "position" is to be restricted to the rights provided by the collective bargaining agreement between the employees and the employer to which the veteran was not a party.

Presumably, Congress provided the benefit of re-employment for the period of one year due to the fact that the original act required training and service on the part of the veteran for a like period. We believe it is significant, that, under the bills now pending both in the Senate and the House providing for the extension of the Selective Training and Service Act, provision has also been made that even when the Act expires the protective portions of Section 8, will continue in force indefinitely.

## 2. The Act Should Be Liberally Construed to Carry Out the Congressional Intent.

In considering the intent of Congress, the entire purpose of the Act must be kept in mind. It provided for an adequate armed force in accordance with a fair and just system of compulsory military training and service in return for which those who served were given the right to re-employment under Section 8. This being true, the rights accorded under said section should be liberally construed to the end that the purpose to be accomplished may be attained. This viewpoint was clearly expressed in *Kay v. General Cable Corporation*, 144 Fed. (2d) 653, in the following language:

> "The policy of the Act is stated in Sec. 1 (b) to be that 'the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system . . .' though such declaration was hardly needed. Every consideration of fairness and justice makes it imperative that the Statute should be construed as liberally as possible so that military service should entail no greater setback in the private pursuit or

career of the returning soldier than is unavoidable. The question here presented, therefore, is not to be solved by the application of abstract tests or formulae; but the factors which usually determine the nature of a disputed relationship must be considered in the light of the purpose which Congress intended to accomplish."

The foregoing language was also approved in the case of *Grasso v. Crowhurst* (No. 8966 U. S. 3rd Circuit Court of Appeals, Feb. 26, 1946).

The late case of *Whirls v. The Trailmobile Company* (No. 10189 U. S. 6th Circuit Court of Appeals, Apr. 5, 1946) expresses a liberal construction in the following language:

"There can be no reasonable doubt that in the mind and heart of the Congress the provisions of Section 308 (c) of the Act were designed and felt to be benevolent and avuncular to the young men compulsorily chosen for military training and service in time of national need. The Act expressly declared that it was imperative to increase and train the personnel of the armed forces of the United States; and that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selection.

"The Act was passed by Congress and approved by the President with full knowledge of the existence of the National Labor Relations Act. That Act was not amended; but surely it should not be presumed that Congress, in failing to amend the Wagner Act, intended to permit the concerted action of a collective bargaining agency and an employer to destroy or whittle down the statutory right of the returning soldier, sailor, airman and marine to restoration to seniority security in his job granted by the Selective Training and Service Act."

That the Act should be "liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation" is also supported in the cases of *Boone v. Lightner*, 319 U. S. 561, 575 and *Hall v. Union Light, Heat and Power Company*, 53 Fed. Supp. 817 (E. D. Ky.).

Statutes should be construed so that significance and effect shall be given, if possible, to every word. (*Market Company v. Hoffman*, 101 U. S. 112, 115). If the restricted interpretation advanced by the defendant union were adopted, this would not be accomplished.

That the statute was adopted "to protect the economic position of persons released from service" was again expressed in the case of *U. S. of America ex rel Stanley vs. Wimbish*, U. S. Circuit Court of Appeals, 4th Circuit, No. 5441, Apr. 10, 1946.

The obligation under Section 8 of the Act was a solemn pact by the people of this nation, acting through Congress, evidencing a sound policy which involved the welfare of fifteen million veterans. Such obligation superseded any right established under collective bargaining agreements made either before or after the veteran entered the military service. Now that he has performed his obligation of service, the greatest liberality should be indulged in the interpretation of this section in order that the reciprocal obligation of the public, as expressed by Congress, may also be fulfilled. It must be remembered that the veterans who are now returning have had many months of war service and it is imperative that rehabilitation be immediate and effective.

## II.

### The Rights Accorded in Sections 8 (b) and (c) of The Act Are Independent Rights and Cannot Be Impaired by Collective Bargaining Agreements.

The right conferred by Section 8 (b) of the statute restoring the veteran to his former position and the further right not to be discharged from said position without cause within one year after restoration, conferred under Sec. 8 (c), are separate, distinct, and independent rights, and should not be interpreted as limiting to one year the restoration of the veteran to his former position without loss of seniority.

In commenting on these independent rights, the court in the case of *Whirls v. The Trailmobile Company, supra*, stated:

> "The right of the veteran to be restored to his former position without loss of seniority is an independent and additional right, not to be impaired by the other protective benefits accorded him by the statute. His right to participation in insurance or other benefits offered by the employer, pursuant to established rules and practices relating to employees on furlough or leave of absence in effect at the time the veteran was ordered into military service, is a separate and additional benefit. Likewise, the last provision in paragraph (c), that the veteran 'shall not be discharged from such position without cause within one year after such restoration,' is a separate, distinct and independent benefit and should not be construed as limiting to one year the restoration of the veteran to his former position without loss of seniority. While he may not be discharged without cause within one year, if he is not so discharged he retains his seniority status as long as the Selective

Training and Service Act in its present phraseology remains in effect. Collective bargaining agreements entered into pursuant to the terms of the Wagner Act must recognize the statutory right of the veteran to the seniority granted him by the selective service statute; and any such agreement which deprives him of that right is invalid to that extent."

**1. Seniority Rights of Non-Veterans Under Collective Bargaining Agreements, Pursuant to the Wagner Act, Are Suspended as They Conflict with the Rights Accorded the Veteran Under Sections 8 (b) and (c) of the Selective Training and Service Act.**

The rights of the veteran Fishgold, under Sections 8 (b) and (c) of the Act, are absolute and independent in character and guarantee one year's employment on the job which the veteran left if it is available upon his return. Seniority rights of non-veterans under collective bargaining agreements made pursuant to the National Labor Relations Act (29 U. S. C. A., Art. 151 et seq., 1940), commonly called the Wagner Act, are suspended by Section 16 (a) of the Selective Training and Service Act, as they conflict with the rights of the veteran. This section provides:

> "Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force."

We know of no reason why the word "suspended" was used in this section, unless it was intended to have application to rights created under collective bargaining agree-

ments which might impair or conflict with the independent rights accorded the veteran under Sections 8 (b) and (c) of the Act.

This section was adopted to prevent situations from arising which might give a non-veteran preference by reason of collective bargaining agreements.

In the case of *Whirls v. The Trailmobile Company, supra,* the court recognized the veteran's superior rights in the following language:

> "Reading together Section 308 (b) B and Section 308 (c) the mandate of the statute is plain that the veteran shall be restored by his private employer to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; and the person so restored to such position shall be considered as having been on furlough or leave of absence during his period of military service and shall be so restored without loss of seniority. As we construe this language, it does not lie within the power of the employer to join with a collective bargaining agency, chosen by the majority of its employees acting in pursuance of the provisions of the Wagner Act, in defeating the purpose and express language of the statute by bargaining away the seniority status of the veteran as it existed at the time of his induction into the armed forces."

It cannot be denied that the seniority right of the non-veteran who displaced Fishgold, granted under a collective bargaining agreement executed pursuant to authority of the National Labor Relations Act, conflicted with the right given to Fishgold under Sections 8 (b) and (c) of the Selective Training and Service Act. Consequently such

non-veteran's right necessarily would be suspended for the protection of the returning veteran.

## III.

### Refusal, by Reason of Seniority Rules Contained in a Collective Bargaining Agreement, to Give the Veteran Work for One Year After His Return Violates Section 8 (c) of the Act.

In the instant case the veteran was refused available work by reason of the collective bargaining agreement which granted seniority to a non-veteran. This was a violation of the veteran's rights to protection in his existing seniority position under the Act and resulted in a virtual discharge for such period. If labor groups can make contracts with employers, which disregard this right, the power to defeat such right is by virtue of a contractual obligation, and the fact that such power was exercised only for a relatively short period of time is of no consequence. The recognition of such power would extend authority to exercise it for the entire period of one year, thus defeating the veteran's right to work. We can see no plausible connection between a "lay-off" occasioned by lack of work to do and an interruption of the veteran's employment because of contractual relations in which he had no voice. It would be unreasonable for the veteran to demand work in the former instance and unfair for the employer by contract to prevent the veteran from the enjoyment of his right in the latter instance. The employer has no control if no work is available, yet the employer and union do have control when work is to be done but the right to perform it is denied the veteran because of seniority rules established by a

collective bargaining agreement. In such instance it would be a discharge against which the veteran is protected.

> To "ignore the plainly expressed intention of the Congress that the veteran should be restored to his position without loss of seniority would be to adopt as unreasonable and unwarranted construction that the clause of the statute protecting the veteran against discharge without cause within one year after his return to his position nullifies the statutory guarantee of the preservation of his seniority status contained in a preceding clause."
>
> (*Whirls v. The Trailmobile Company, supra.*)

**1. "Super-Seniority" Is a Misnomer as Applied to Veteran's Rights.**

The term "super-seniority" has been applied in many instances to describe the right accorded the veteran under this legislation; that such an interpretation is erroneous, is apparent upon analysis of the nature of the right and the purpose to be accomplished. Seniority as used in labor relations refers to a permanent status by reason of continued service and acquired skill in a certain employment. It is established by contract. The act in question provides employment rights to the veteran extending for a period of one year by reason of military service for the purpose of rehabilitation. Consequently there is no relationship between the two rights. The veteran's right is better described as a service adjustment benefit.

The court in *Whirls v. The Trailmobile Company, supra,* commented upon this right as follows:

> "The right to collective bargaining and all the privileges conferred by the Wagner Act upon non-

combatant workers may be well preserved by just recognition in their collective bargaining agreements of the fair intendment of the Selective Training and Service Act that those who went to war must be protected in their then-existing seniority positions as long as the Act remains in effect. If this principle is accepted, there need be no industrial strife between those who worked and fought and those who worked but did not fight—which counsel for the Union and for the Company so gloomily predict. In our view, the language of the pertinent section of the Selective Training and Service Act, in its context, impels acceptance of this principle."

## IV.

## Rules of the Selective Service Administrator Construing the Veteran's Right Should Be Followed.

Under Section 10 (a) of the Act in question, the President is authorized:

> "(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;
>
> "(2) To create and establish a Selective Service System * * *." (See Appendix A.)

Executive Order 8545 dated September 2, 1940, (5 Fed. Reg. 3997) was issued by the President promulgating rules and regulations which created and established the Selective Service System and provided for its organization and administration as follows:

> "The Director of Selective Service is responsible directly to the President. He is hereby charged with the administration of the Selective Service Law and is hereby authorized and directed:

"(a) To prescribe such amendments to these regulations as he shall deem necessary:

"(b) To issue such public notices, orders and instructions as shall be necessary to the efficient administration of the Selective Service Law. * * *"

Pursuant to this authority, the Director of Selective Service on May 20, 1944, issued Local Board Memorandum No. 190-A as follows:

> "A returning veteran is entitled to reinstatement in his former position or one of like seniority, status, and pay, even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority * * *.
>
> "A veteran, who has been reinstated to his former position, cannot within one year be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his re-employment rights under the Act, and would be, in effect, a repeal of an Act of Congress."

Various public debates took place prior to the adoption of this Memorandum, and after its issuance it was called to the public's attention by discussions and panels over the radio and in press comments. At a special Sub-Committee hearing of the Committee on Military Affairs of the House of Representatives, held September 12, 1944, the following discussion took place between Mr. Costello of the Committee and Colonel Keesling, representing the Selective Service System:

> "Mr. Costello: In reference to the question of seniority rights of veterans who have been in the service for some time, when they come back to be re-

employed, are they being given seniority as though they had been retained in the employment of private companies, where nonveterans are employed?

"Colonel Keesling: That is a matter, as you know, which has been a subject of considerable comment in the press and elsewhere.

"I would like to go into a little detail on that and try to clarify our position. There is no need to have any battle between individuals on a controversy where principle is involved, or where there is a matter of the construction of language.

"As we read Section 8, we have construed it to mean that the veteran is entitled to restoration in his job, regardless of his seniority or the seniority of any other individuals, if he meets the various conditions precedent set forth in Section 8, namely, if he applies within 40 days after discharge; if he is qualified to perform the job; if he has a certificate from the War Department; and if it is not unreasonable or impossible for the employer to employ him.

"Under those facts, we have held that even though a worker had been in a particular plant for 5 years, whereas the man beside him had been in the plant for only 3 years, and the man who had been in the plant 3 years went to war and came back and there was only one job left, the man who went to war would be re-employed even if it necessitated the release of the man with 2 years' seniority over the veteran. That is our position which raised the controversy.

"We took that construction, and, in line with our policy of fighting principles rather than personalitices, there is no reason for us to fight with individuals about it. We think our construction is right.

"The Act provides that there can be a determination by the Court somewhere along the line, and if

> the Court decides we are wrong, we will, of course, abide by the Court's decision. If Congress decides that our interpretation is erroneous, or that the Court's decision is wrong, Congress can clarify the situation by an amendment."

It will be noted that in this discussion this committee was directly advised that in the event Congress failed to agree with such interpretations an amendment would be appropriate. However, a few days following, H. R. 5386 was introduced in the House of Representatives for the purpose of amending Section 8 (b), directly involved in this case, which increased the veteran's rights under the section by extending the time during which he is required to apply for reinstatement from forty (40) to ninety (90) days. This amendment was later enacted into the statute on December 8, 1944. (Pub. Law 473, 78 Cong.) We submit that the re-enactment of the statute under such conditions, without changing the interpretation which had been adopted by the Director, was ample evidence of Congressional acquiescence. (*McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 492; *Massachusetts Mutual Life Insurance Co. v. U. S.*, 288 U. S. 269, 273; and *National Lead Co. v. U. S.*, 252 U. S. 140, 146.)

It does not appear probable that on such a vital issue Congress would permit the Director of Selective Service to convey a false impression to the many veterans who had been apprised of the Director's Memorandum and who presumably were depending on it upon return to civilian life. After the issuance of Local Board Memorandum No. 190-A, Congress adopted:

> "1. Servicemen's Readjustment Act of 1944 (Public Law 346, 78th Congress; Act of June 22,

1944, 58 Stat. 293, 38 U. S. C. A. Sec. 695) creating Veterans Placement Service Board composed of the Administrator of Veterans Affairs as Chairman, the Director of Selective Service, and the Federal Security Administrator.

"2. Veterans Preference Act of 1944 (Public Law 359, 78th Congress; Act of June 27, 1944, 58 Stat. 387) affecting Section 8 (b) (A) of the Selective Service Act by conferring certain preferences on veterans.

"3. Act of October 3, 1944 (58 Stat. 788, 50 U. S. C. A. App. 1663) establishing the Retraining and Re-employment Administration to have general jurisdiction over veterans' matters."

Section 600 of Title IV of the Servicemen's Readjustment Act, commonly referred to as the "G. I. Bill of Rights", provided.

"(a) In the enactment of the provisions of this title Congress declares as its intent and purpose that there shall be an effective job counseling and employment placement service for veterans, and that, to this end, policies shall be promulgated and administered, so as to provide for them the maximum of job opportunity in the field of gainful employment * * *."

The employment of the word "maximum" in this section indicated a Congressional intent to give job preference to veterans. General Lewis B. Hershey, Director of Selective Service, issued a statement as follows:

"The policy follows long established historical precedents of our Government. It has been a factor in the efficiency of our armed forces because it has made our fighting men believe that their Government

> would not forget their contribution in keeping war from the American homeland and in saving the world."

This is indeed a sound announcement.

Much stress has been placed upon certain decisions by the National Labor Relations Board adopting an opposite view. (*In re Scoville Mfg. Co.*, 21 W. L. R. 200; *In re Arbitration* between *Timkin Roller-Bearing Co.* and *U. S. Steel Workers of America, etc.*, 16 L. R. R. 158-167; *Firestone Tire & Rubber Company & United Rubber Workers of America, etc.*, 17 L. R. R. 77-99. (But see dissenting opinion of Frederic R. Twelvetrees *In the Matter of the Arbitration between Bell Aircraft Corporation, etc., & United Automobile, Aircraft and Agricultural Implement Workers of America, etc. et al.*, Feb. 20, 1946.)

It is apparent that these decisions did not take into consideration the fact that the rights created in favor of the veteran were independent and additional rights not to be impaired by collective bargaining agreements, nor did they consider the suspension of the rights under collective bargaining agreements in conflict with the rights of the veteran. We believe the soundness of the reasoning in the case of *Whirls v. The Trailmobile Company, supra,* completely answers the reasoning upon which the Labor Board's decisions were predicated. Inasmuch as the question must ultimately be decided by the courts, the conclusions announced in this case cannot be lightly disregarded.

The Attorney General of the United States, under whose direction the various District Attorneys have conducted litigation for the protection of the veteran under Section 8, is in full agreement with the Director's views. Consequently we believe that the Director's "rulings, interpretations, and

opinions" • • • "While not controlling upon the courts" • • • "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore et al v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161.

### 1. The Majority Opinion in the Court Below Is Inconsistent with the Uniform Application of the Act.

The restricted construction of Sections 8 (b) and (c) of the Act adopted by the majority opinion in the court below is inconsistent with the intent of Congress, as we have heretofore pointed out in this brief. If applied literally, it would emasculate any substantive rights which Congress intended to create. The opinion did not recognize that the right accorded to the veteran is an independent right protected by statute, not to be impaired by collective bargaining agreements. The dissenting opinion is in accord with a liberal construction of this legislation, which must be adopted if any meaning beneficial to the veteran is to result. If the majority opinion is followed, no uniformity of application would apply.

Judge Chase in his dissent points this out as follows:

> "And finally Congress passed this statute for the benefit alike of all honorably discharged veterans who had been taken from employment more stable than what is called temporary. There is no discernable purpose not to treat them all the same and no good reason why Congress should not have intended to make a man who was inducted from a closed shop as secure in his job during the first year after his return as a man inducted from an open shop would be. One as much as the other would need this ad-

justment period before facing the full brunt of competition for his job. I think Congress has by word and act well demonstrated its purpose to provide for equality of treatment in this respect regardless of private contracts made by any employer with anybody."

It has been said that to adopt the viewpoint advocated in this brief would result in giving the veteran some one else's job rather than the one he left. (See *Olin Industries v. Barnett et al. U. S. District Court*, S. D. S. D. Illinois, Civil No. 618, January 24, 1946.) However, such a statement presupposes that the employee attaches to the job. This is not an incident of employment unless accorded by statute or contract. (*Elder v. New York Central R. R. Co.*, 152 Fed. (2nd) 361-64.) The non-veteran, in the instant case, could only assert the right to the job over the veteran or the theory that the collective bargaining agreement protected him in this alleged right. Yet the veteran's right is statutory and the non-veteran's right is suspended by the same statute. Consequently the Act does not give the veteran the non-veteran's job, but reinstates him to the job which he left to enter the military service.

## V.

### Relative Equities Involved.

Those who have opposed the veteran's right to be restored to his former position for a period of one year after return from his military service have predicted dire consequences to industry and labor if our contentions as to the construction of the statute are adopted by the court. They have asserted that it would unnecessarily slow up the processes of reconversion which are so vitally needed throughout the nation at this time. It is apparent, however, that

most employers are recognizing the right of the veteran to re-employment under Section 8 of the Act as in March, 1946, General Lewis B. Hershey, Selective Service Director, after pointing out that more than ten million men and women had been discharged as of March, 1946, and that several hundred thousand have been given assistance by the Selective Service System, further stated:

> "It is significant, when considered in the light of these huge numbers discharged, that only 17 cases have actually gone to trial and that less than 400 cases are pending in the Federal courts or awaiting action in the hands of United States attorneys." (See Selective Service Magazine, Vol. VI, No. 3, March, 1946.)

We readily admit that the problem of reconversion of business to a peace time basis and the rehabilitation of the veteran are the greatest problems confronting our nation today, perhaps greater than any battle fought during the entire war. We deny, however, that in its solution the rehabilitation of the veteran should be subservient to the reconversion of industry. We believe that both should go hand in hand and the problem should be solved by the realization that the great struggle which we have won has created situations which will prevent the normal functioning of human and business relations for an indeterminate period in the future. Every citizen in the past few months has been confronted with this undeniable fact. Consequently both management and labor must realize, now that the war is over and the veteran has performed his part of the obligation, they cannot follow the even tenor of their ways and give no consideration to his rights. Any other viewpoint would not be in keeping with "long established historical precedents of our Government" and our people. We have never forgotten in times past the

contribution which the veteran has made in protecting the American homeland from invasion. To change such policy now would be to deny the veteran, after he has performed his obligations under the Act, the benefits which were assured him by its terms.

## CONCLUSION

We are of the firm opinion that Congress in the enactment of this legislation had in mind a long-range program, which not only included the training of an army and navy for the protection of the nation, but also for the rehabilitation of the veteran who served so that he could quickly return to his civilian pursuits and re-establish himself as a citizen. If that is not the meaning of the Act, then it would appear that the purpose to be accomplished would result in little or no value. However, the whole course of this legislation evidences a purpose and intent on the part of Congress to grant a right, born of service, which would be of the greatest benefit to the veteran upon his return.

We, therefore, respectfully submit that for the reasons herein enumerated the judgment of the majority of the Circuit Court of Appeals should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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Of the Indiana Bar,
*Counsel for*
The American Legion,
Amicus Curiae.

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*Of Counsel.*

# APPENDIX A

## The Selective Training and Service Act of 1940, as Amended

**Section 1. Declaration of Policy and Intent of Congress.**

Be enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that (a) the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.

(b) The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of Selective Compulsory Military Training and service, * * *

**Sec. 8: Certificates * * *; Re-employment * * *; Replacement in Industry.**

(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any

employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety* days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration. * * *

* At time plaintiff applied for re-employment, this read forty days.

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States District attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in the replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act. * * *

**Sec. 10. Rules and Regulations; Selective Service System.**

(a) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this Act;

(2) To create and establish a Selective Service System • • •

(3) To appoint, by and with the advice and consent of the Senate • • • a Director of Selective Service • • •.

(b) The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except Section 9) • • •.

**Sec. 16. Suspension of Conflicting Laws; Duration of Act; • • •.**

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) All the provisions of this Act, except the provisions of Sections • • • 8 (g) • • • shall become inoperative and cease to apply on and after May 15, 1946 • • •.

# SUPREME COURT OF THE UNITED STATES.

No. 970.—October Term, 1945.

| | |
|---|---|
| Abraham Fishgold, Petitioner, *vs.* Sullivan Drydock & Repair Corporation, Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[May 27, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner is an employee of the Sullivan Drydock & Repair Corporation. He entered its employ in 1942 and worked for it at a shipyard until he was inducted into the Army in 1943. He served in the Army a little over a year and was honorably discharged and received a certificate to that effect. He had worked for the corporation as a welder and after his tour of duty in the Army ended, he was still qualified to perform the duties of a welder. Within forty days of his discharge, he applied to the corporation, as was his right under the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 301, for restoration to his former position.[1] He was reemployed as a welder on August 25, 1944.

[1] The Act provides in part:

"Sec. 8(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. . . .

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position

The Corporation and Local 13 of the Industrial Union of Marine and Shipbuilding Workers of America had a collective bargaining agreement which provided:[2]

> "Promotions and reclassifications and increases or decreases in the working force shall be based upon length of service and ability to do the job. Wherever between two or more men, ability is fairly equal, length of service shall be the controlling factor."

As work at the shipyard decreased, men would be laid off. The men selected by the foremen, on the basis of ability and seniority to be laid off would report to a department head for reassignment on the basis of their relative seniority when work became available. On each of nine days in the spring of 1945 petitioner was laid off although other welders, not veterans of the recent war, possessing the same or similar skill as petitioner, were given work on those days. These men were preferred because they had a higher shop seniority than petitioner. The decision to lay off petitioner followed a decision of an arbitrator who ruled that the seniority provisions of the collective bargaining agreement, which we have quoted, required it and that they were not inconsistent with the provisions of the Selective Training and Service Act of 1940.

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of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so . . . ."

The forty day period has been extended to ninety days. Section 8 (b) as amended in 1944, 58 Stat. 798, gives the veteran a right to be reemployed if he makes application "within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year."

[2] The agreement provided:

"Any employee other than a probationary employee who is drafted or volunteers for the Naval, Military or Merchant Marine Service of the United States, shall retain his seniority standing. In any further determination of said employee's seniority status, the length of time spent by the employee in such service shall count toward his seniority as if he were actually and continuously employed by the Company. Any such employee who volunteers or is drafted must give the Company notice of his intention to so leave his employment. Any such employee who, within forty (40) days after his release or discharge from said service applies for re-employment, shall be rehired by the Company, provided work is available and the employee is reasonably fit for duty. Availability for work will be determined according to accumulated seniority and ability. If re-employed, said employee shall then receive the then current rate of pay for the job for which he is re-employed."

Thereupon petitioner brought this suit, pursuant to § 8(c) of the Act,[3] to obtain a declaratory judgment as to his rights under the Act and to obtain compensation for the days he was not allowed to work. The corporation answered, justifying its action by the provisions of the collective bargaining agreement and the decision of the arbitrator. The union was permitted to intervene.[4] It alleged in its answer that the action of the corporation was warranted by the provisions of the collective bargaining agreement and was not in violation of the Act. The District Court refused the declaratory judgment requested, but entered a money judgment for petitioner for the loss of wages during the nine days in question. 62 F. Supp. 25. It held that petitioner was laid off in violation of the Act. It was also of the view that the collective bargaining agreement was not inconsistent with the Act. Only the union appealed. The Circuit Court of Appeals reversed, one judge dissenting. — F. 2d —. It held that the Act did not give petitioner the preference which he claimed and that the terms of the collective bargaining agreement justified the corporation's action. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

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[3] Section 8(c) provides:

"In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney (or comparable official) for the district in which such private employer maintains a place of business, the person claiming to be entitled to the benefits of such provisions, the United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim and in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits."

The United States appeared as *amicus curiae* in the Circuit Court of Appeals. It appears in this Court as representative of petitioner by reason of the provisions of § 8(c).

[4] Permissive intervention is governed by Rule 24(b) of the Rules of Civil Procedure which allows it on timely application "when an applicant's claim or defense and the main action have a question of law or fact in common."

I. We are met at the outset with the claim that the union had no appealable interest in the judgment entered by the District Court and accordingly that the Circuit Court of Appeals lacked jurisdiction to entertain it. It is pointed out that a money judgment was entered only against the corporation and that no relief was granted against the union. It is therefore argued that the judgment did not affect any substantive right of the union and that at most the union had merely an interest in the outcome of litigation which might establish a precedent adverse to it. *Boston Tow Boat Co.* v. *United States*, 321 U. S. 632. It is also pointed out that the statutory guarantee against discharge without cause for one year[5] had expired at the time of the District Court's judgment, that therefore no declaratory relief was granted, and that petitioner's rights for the future were not adjudicated. It is contended that the dispute between petitioner and the union has thus become moot.

But that argument misses the point. The answer of the corporation and the union put in issue the question whether there was a conflict between the collective bargaining agreement and the Act and if so, which one prevailed. The parties to the collective bargaining agreement—the union and the corporation—were before the court. A decision on the merits of petitioner's claim necessarily involved a reconciliation between the Act and the collective bargaining agreement or, if it appeared that they conflicted, an adjudication that one superseded the other. As we have noted, the District Court was of the view that the collective bargaining agreement was not inconsistent with the Act. But, however the result might be rationalized, a decision for or against petitioner necessarily involved a construction of the collective bargaining agreement. That issue was adjudicated, with the union as a party. Hence if the union had thereafter instituted a separate suit for an interpretation of the agreement, it would be met

[5] Section 8(c) of the Act provides:

"Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

Paragraphs A and B of subsection (b) of § 8 are set forth in note 1, *supra*.

with the plea of *res judicata*. And that plea would be sustained, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement—the union and the corporation—were parties to the prior suit. This elementary principle has long been recognized. Black, The Law of Judgments (2d ed.) pp. 764, 821, 936. As stated in *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, a prior judgment "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." And see *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415; *Grubb* v. *Public Utilities Commission*, 281 U. S. 470, 479; *Stoll* v. *Gottlieb*, 305 U. S. 165; *Chicot County Drainage Dept.* v. *Baxter State Bank*, 308 U. S. 371, 375, 378. The case of *Boston Tow Boat Co.* v. *United States*, *supra*, would be relevant if the collective bargaining agreement in issue was one between different parties.[6] Then the union's interest would be merely the interest of one seeking reversal of an adverse precedent. And its "independent right to relief" would not be increased by reason of its intervention in the cause. *Alexander Sprunt & Son* v. *United States*, 281 U. S. 249, 255. But here the rights of the union and its members under a contract with the corporation were adjudicated in a proceeding in which the union was a party. The contract was still in existence at the time of the appeal. Hence the case was not moot. And the only way the union could protect itself against that binding interpretation of the agreement was by an appeal. For then the union found itself in the position where a right of its own (*Alexander Sprunt & Son* v. *United States*, *supra*, p. 255) was adjudicated.[7]

It is suggested, however, that the result of what we do is to free the union and the employer from costs and burden Fishgold

[6] In that case Boston Tow Boat Co. intervened in a proceeding before the Interstate Commerce Commission involving the status of another carrier. It sought to appeal from the adverse decision against the other carrier. That right was denied. The order in question was not determinative of the status of Boston Tow Boat Co. That question was involved in another order of the Commission from which Boston Tow Boat Co. had an appeal pending.

[7] The case is therefore closely analogous to one where the interest of an intervenor in property involved in the litigation was adjudicated. Dexter Horton Nat. Bk. v. Hawkins, 190 Fed. 924; United States v. Northwestern Development Co., 203 Fed. 960.

with them. There are several answers to that. The allowance of costs has no bearing on what is or what is not *res judicata*. Their allowance to the prevailing party is not, moreover, a rigid rule. Under the Rules of Civil Procedure the court can direct otherwise. Rule 54(d). And finally, Congress has provided in § 8(e) of this Act that when a veteran applies to the District Court for the benefits of the Act "no fees or court costs shall be taxed" against him.

II. We turn then to the merits. The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

These guarantees are contained in § 8 of the Act[8] and extend to a veteran, honorably discharged and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment.[9] § 8(b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position "or to a position of like seniority, status, and pay." § 8(b) (A) (B). He is thus protected against receiving a job inferior to that which he had before entering the armed services. (3) He shall be "restored without loss of seniority" and be considered "as having been on furlough or leave of absence" during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence. § 8(c). Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. (4) He "shall not be discharged from such position without cause within one year after such restoration." § 8(c).

Petitioner's case comes down to the meaning of this guarantee against "discharge". "Discharge" is construed by him to include

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[8] Section 8(b) is set forth in note 1, *supra*, and § 8(e) in note 5, *supra*.

[9] As we have noted, the original forty day period has been extended to ninety days. See note 1, *supra*.

"lay-off". And it is earnestly argued that Congress could not have intended to restore the veteran to his position, prevent his discharge without cause for one year, and yet not intend that he perform actual work if it was available.

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. See *Boone* v. *Lightner*, 319 U. S. 561, 575. And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act. Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

We can find no support for petitioner's position in the provision of § 8(b) which restores him to his former position or to a "position of like seniority". Nor can we find it in § 8(c) which directs that he "shall be so restored without loss of seniority". As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence. But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more.

Nor can we read into the guarantee against discharge "from such position" a gain or step-up in seniority. That guarantee does not in terms deal with the seniority problem. The problem of seniority is covered by the preceding provisions. The guarantee against discharge "from such position" is broad enough to cover demotions. The veteran is entitled to be restored to his old position or to a "position of like seniority, status, and pay." If within the statutory period, he is demoted, his status which the Act was designed to protect, has been affected and the old employ-

ment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of § 8(c) be "discharged from such position." But the guarantee against discharge does not on its face suggest the grant of a preference to the veteran over and above that which was accorded by the seniority of "such position".

Discharge normally means termination of the employment relationship or loss of a position.[10] In common parlance and in industrial parlance a person who has been laid off by operation of a seniority system and put on a waiting list for reassignment would hardly be considered as having been "discharged".[11] There are three terms used in § 8(c) which relate to various types of cessation of work—a "furlough", a "leave of absence" and a discharge. A furlough is not considered a discharge. It is a form of lay-off. So is a leave of absence. And whether either results from unilateral action by the employer or otherwise, consequences are quite different from termination of the employment relationship. Section 8(c) of the Act recognizes that insurance and other benefits may continue to accrue to an employee on furlough or on leave of absence. An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions.[12] Thus when Congress desired to cover the contingency of a lay-off, it used apt words to describe it. If it had desired to enact that, so long as there was work, no restored veteran, regardless of seniority, could be temporarily laid off during the year following his restoration when the slackening of work required a reduction in forces, we are bound to believe that it would have used a word of the kind which it had itself recognized as being descriptive of that situation.

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[10] "Release or dismissal from an office, employment, etc., as, the *discharge* of a workman." Webster's New International Dictionary (2d ed.)

"To relieve of a charge or office; (more usually) to dismiss from office, service, or employment; to cashier." Oxford English Dictionary.

[11] Temporary suspension of an employee's work commonly does not affect the continuance of his status. See National Labor Relations Board v. Waterman S. S. Co., 309 U. S. 206; North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 109 F. 2d 76, 82.

"Lay-off" is defined as "A period during which a workman is temporarily dismissed or allowed to leave his work; that part or season of the year during which activity in a particular business or game is partly or completely suspended; an off-season." Oxford English Dictionary, Supp.

[12] See Union Agreement Provisions, Bureau of Labor Statistics, Department of Labor, H. Doc. No. 723, 77th Cong., 2d Sess., chs. 8, 14.

The "position" to which the veteran is restored is the "position" which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still had his "position" when he was inducted. And in the same sense he retains it though a lay-off interrupts the continuity of work in the statutory period. Moreover, a veteran on his return is entitled to his old "position" or its equivalent even though at the time of his application the plant is closed down, say for retooling, and no work is available, unless of course the private employer's "circumstances have so changed as to make it impossible or unreasonable" to restore him. § 8(b)-(B). He is entitled to be recalled to work in accordance with his seniority. His "position" exists though no work is then available. The slackening of work which causes him to be laid off by operation of a seniority system is neither a removal or dismissal or discharge from the "position" in any normal sense. Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system. What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year.

The construction which we have given "discharged" does not rob that guarantee of vitality. As the Circuit Court of Appeals observed, where there is a closed shop agreement the union would normally afford its members protection against termination of their employment status without cause. But in many situations the guarantee against dismissal without cause for one year is of great practical importance and is a protection granted veterans only.

Our construction of the Act finds support in its legislative history. Representative May had charge of the bill on the floor of the House. He explained an amendment to § 8(c), which added the words "shall be considered during the period of service in such forces as on furlough or leave of absence" and also elaborated the clause dealing with "insurance or other benefits". He said:

> "I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement." 86 Cong. Rec. 11702.

And before that amendment the committee Report of the Senate stated:

> "The Congress, in this bill, has declared as its purpose and intent that every man who leaves his job to participate in this training and service should be reemployed without loss of seniority or other benefits upon his return to civil life." S. Rep. No. 2002, 76th Cong., 3d Sess., p. 8.

We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work when by operation of the seniority system there was none then available for him.

It is said, however, that when Congress amended § 8 of the Act in 1944[13] (58 Stat. 798) and extended the Act in 1945 without any change in § 8 (Pub. L. 54, 79th Cong., 1st Sess.), it was apprised of an administrative interpretation of § 8(c) that a veteran was entitled to his former job regardless of seniority; and that therefore Congressional approval of or acquiescence in the administrative construction would be inferred. See *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273, and cases cited. An administrative interpretation was rendered by the Director of Selective Service who was authorized to administer the Act.[14] He had ruled that the Act required reinstatement of a veteran to "his former position or one of like seniority, status, and pay even though such reinstatement necessitates the discharge of a non-veteran with a greater seniority."[15] But a different construction was given to § 8(c) by the National War Labor Board in its handling of disputes arising out of the negotiation of collective bargaining agreements.[16] The Board read the Act as we read it.

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[13] See note 1, *supra*.

[14] Executive Order 8545, September 23, 1940, 5 Fed. Reg. 3779.

[15] Local Board Memorandum 190-A, May 20, 1944, Part IV, § 1(C).

[16] See Scoville Mfg. Co., 21 War Labor Rep. 200, 201, 202.

The ruling of the Director may be resorted to for guidance. See *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140; *Mabee* v. *White Plains Pub. Co.*, 327 U. S. —. But his rulings are not made in adversary proceedings and are not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions. *Skidmore* v. *Swift & Co.*, *supra*, p. 139. The history and language of the Act would need be far less clear for us to give his rulings persuasive weight. Moreover, as the Circuit Court of Appeals pointed out, the contrariety of administrative rulings[17] lends less credence to the contention that Congress by the amendment in 1944 and the extension in 1945 showed a preference for one over the other. In view of the language of the Act and the nature of the administrative findings we would want explicit indication by Congress that it chose the Director's interpretation before we concluded that Congress had adopted it.

*Affirmed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[17] See Note 54 Yale L. Journ. 417.

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Mr. Justice BLACK dissenting.

I believe we should reverse the judgment of the Circuit Court of Appeals and remand the cause to it with directions to dismiss the appeal for want of jurisdiction because the Union was not a proper party to appeal. The money judgment was in favor of Fishgold and against the Sullivan Dry Dock and Repair Company. Had the Company paid the judgment I see no way in which the Union would have been "aggrieved." The only reason advanced by the Court for holding that the Union was "aggrieved," is that, had the District Court judgment remained on the books, the judicially formulated doctrine of *res adjudicata* would have barred the Union in any future proceedings from challenging the District Court's application of the federal statute to the particular collective bargaining agreement. A fair application of *res judicata* bars a party in a second litigation only if that proceeding involves the same issues as the first litigation be-

tween the same adverse parties or privies. This means that *res judicata* could bar the Union only in a new proceeding between it and Fishgold or his privies. But there is no possibility of such litigation since the seniority right which the District Court held Fishgold had under the statute had under its provisions expired by the time the Union appealed. *Res judicata* would not have barred the Union in a proceeding between it and any other party since no other party was a party adverse to the Union in the present suit. And this includes any possible proceeding between the Union and the Sullivan Dry Dock Company since that Company, though a party, was not an adverse party in the trial court. None of the cases cited by the Court's opinion support the proposition that a party is bound in a future litigation against a party that was not an adverse party, but on the same side, in the earlier litigation. Nor do these cases or any other decision of this Court of which I am aware formulate as the rule of this Court the harsh doctrine of collateral estoppel, adopted in a few state jurisdictions, which always bars a losing party, so long as the issue is the same, even though the later litigation involves different adverse parties. It is unlikely that this harsh doctrine, never adopted by this Court, would in the future have been applied to bar the Union in any further proceedings involving interpretation of the scope of its collective bargaining agreement in the light of the federal statute. In my opinion the Union would not have been barred by the trial court's judgment. It was therefore not an aggrieved party and not entitled to appeal.

The result of permitting parties not adversely affected to appeal a judgment is to impose burdens upon litigants actually interested when those litigants may themselves be fully satisfied with the judgment. The scope of *res judicata* should not be extended to produce such a result. This case illustrates the wisdom of the practice which permits parties to settle their own lawsuits without intervention by others interested only in precedents. *Boston Towboat Company* v. *United States*, 321 U. S. 632.